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Supreme Court of the United States

STATE OF CALIFORNIA EX REL.
EDMUND G. BROWN JR., ATTORNEY GENERAL,

Cross-Petitioner,

v.

CORAL POWER, L.L.C., et al.,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a tariff which contains no ascertainable rates, just a statement that rates will be determined "by agreement," coupled with post-performance reporting of the rates charged, produces valid filed rates under the Federal Power Act and this Court's decisions in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), and *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

LIST OF PARTIES

Cross-Petitioner State of California ex rel. Edmund G. Brown Jr., Attorney General, initiated the proceedings below by filing a complaint with the Federal Energy Regulatory Commission ("FERC"), and petitioned the Ninth Circuit Court of Appeals for review of FERC's orders.

The following cross-respondents were intervenors in the Ninth Circuit:

AES Delano, Inc. (f/k/a Delano Energy Company, Inc.)
AES Placerita, Inc.
Arizona Public Service Company
Avista Corporation
Avista Energy, Inc.
BP Energy Co.
Cabrillo Power I LLC
Cabrillo Power II LLC
City of Tacoma, Washington
Coral Power LLC
Duke Energy North America, LLC
Duke Energy Trading and Marketing, LLC
Dynegy Power Marketing, Inc.
El Paso Merchant Energy, L.P.
El Segundo Power, LLC
Enron Energy Services, Inc.
Enron Power Marketing, Inc.
Long Beach Generation LLC
Mirant Americas Energy Marketing, Inc.
Mirant California, LLC
Mirant Delta, LLC
Mirant Potrero, LLC
Morgan Stanley Capital Group, Inc.
Mountainview Power Co.
Pacificorp
Pacificorp Power Marketing, Inc.

LIST OF PARTIES – Continued

Pinncale West Capital Corp.
Portland General Electric Company
Powerex Corporation
PPL Energy Plus, LLC
PPL Montana, LLC
Public Service Company of Colorado
Public Service Company of New Mexico
Puget Sound Energy, Inc.
Reliant Energy Services, Inc.
Riverside Canal Power Co.
Sempra Energy Trading Corp.
Sempra Energy Solutions, LLC
(f/k/a Sempra Energy Solutions)
Sempra Generation (f/k/a Sempra Energy Resources)
Strategic Energy LLC
TransAlta Energy Marketing (California) Inc.
TransAlta Energy Marketing (U.S.) Inc.
TransCanada Energy Ltd.

Cross-respondent Federal Energy Regulatory Commission was the respondent in the Ninth Circuit.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

The State of California *ex rel.* Edmund G. Brown Jr., Attorney General, respectfully submits this cross-petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS AND ORDERS ENTERED BELOW

The Ninth Circuit's opinion is reported at 383 F.3d 1006 (2004). *See* Petitioners' Appendix ("Pet. App.") at 1a-19a. FERC's orders are reported at 99 FERC ¶ 61,247, *rehearing denied*, 100 FERC ¶ 61,295 (2002). Pet. App. at 20a-79a.

JURISDICTION

The Ninth Circuit entered its judgment on September 9, 2004, and denied rehearing on July 31, 2006. Petitioners sought and obtained an extension of time for filing a petition for a writ of certiorari until December 28, 2006. The petition was filed on December 28, 2006, and placed on the Court's docket on January 4, 2007, under case number 06-888. The California Attorney General's cross-petition is timely filed under Rule 12.5 of the Court's rules. The Court has jurisdiction under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Power Act, 16 U.S.C. § 791a *et seq.*, and the Natural Gas Act, 15 U.S.C.

§ 717 *et seq.*, are reproduced in the appendix to the petition. Pet. App. at 82a-95a. Relevant provisions of the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*, and the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, are reproduced in the appendix to this cross-petition.

STATEMENT

The California Attorney General incorporates by reference the statement of the case set forth in his brief in opposition in No. 06-888.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

A. If The Writ Issues, The Court Should Also Grant The Cross-Petition To Ensure Adequate Consideration Of The Petition Itself, And To Avoid Risking A Decision That Conflicts With Well-Settled Law.

As explained in the California Attorney General's brief in opposition in No. 06-888, the petition for a writ of certiorari filed by Coral Power L.L.C., et al. should be denied. If the Court were to grant the petition, however, it should also grant this cross-petition.

Petitioners claim, in essence, that the Ninth Circuit's decision vitiates the filed rate doctrine. That claim assumes that the filed rate doctrine applies in the first instance. The filed rate doctrine does not apply here, however, because petitioners did *not* file their rates.

The text and legislative history of the Federal Power Act ("FPA") and this Court's decisions in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), and *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), directly conflict with petitioners' notion that a "market-based rate tariff," which states only that rates will be determined "by agreement," constitutes a lawful filed rate. Indeed, Section 205 of the FPA, 16 U.S.C. § 824d, read together with *the MCI* and *Maislin* decisions, compels the conclusion that FERC's filing requirements for market-based rates violate the FPA *per se*. Because rates were not – and could not have been – properly filed under any theory, the filed rate doctrine does not pose a bar to refund claims in this case.

For these reasons, if the Court grants review, it should also grant the cross-petition. The Court should not simply assume, without directly deciding, that the filed rate doctrine applies here because public utilities have no "contractual reliance interests," Petition at 2, in rates they failed to file as required by Section 205. *See Security Services, Inc. v. K Mart Corp.*, 511 U.S. 431, 440-43 (1994). Similarly, if petitioners did not satisfy the statutory requirement for prior notice and filing, there is no possibility that FERC could "impose retroactive refunds not contemplated by Congress," Petition at 2, because the filed rate doctrine only bars retroactive changes to "properly filed" rates. *Arkansas Louisiana Gas Co. v. Hall* ("*Arkla*"), 453 U.S. 571, 577 (1981).[1] Thus, the court should grant the

[1] *Arkla* involved the cognate provisions of the Natural Gas Act ("NGA"). This cross-petition follows the Court's "established practice of citing interchangeably decisions interpreting the pertinent sections" of the NGA and the FPA. *Arkla*, 453 U.S. at 577 n.7.

cross-petition to avoid glossing over an essential predicate to the petition itself.

More importantly, granting review without addressing whether rates were properly filed in the first instance could undermine this Court's decisions in *MCI* and *Maislin* and unsettle the law in this area. The Ninth Circuit tried to distinguish *MCI* and *Maislin* in an attempt to reconcile FERC's market-based rate regime with the statutory scheme. Pet. App. at 10a-11a. But the court's conclusion that quarterly, post-performance reporting of rates cures the failure to file rates in advance runs directly contrary to *MCI* and *Maislin* and the FPA itself. Thus, the Court should grant the cross-petition to avoid any suggestion that it is retreating from its long-standing interpretation of the statutory filing requirement and the filed rate doctrine.

In sum, if the Court decides to wade into this controversy – and the California Attorney General believes review is unwarranted – it should take a comprehensive approach. Any examination should include both the question presented by the petition and the assumption on which it is based.

B. The Plain Wording Of Federal Power Act Section 205 And This Court's Decisions In *MCI* And *Maislin* Make Clear That A Market-Based Rate Tariff Fails, As A Matter Of Law, To Produce Valid Filed Rates.

As discussed above, the petition rests on an assumption that market-based rate tariffs produce valid filed rates. Yet that assumption directly conflicts with the plain wording of Section 205 of the FPA, 16 U.S.C. § 824d, and this Court's decisions in *MCI*, 512 U.S. 218, and *Maislin*,

497 U.S. 116, as well as numerous circuit court decisions interpreting the FPA and related statutory schemes.

1. A tariff which states only that rates will be determined "by agreement," and which contains no ascertainable rates, violates the FPA Section 205 requirement that utilities file schedules "showing all rates and charges for any transmission or sale subject to the jurisdiction of [FERC]." 16 U.S.C. § 824d(c)-(d).

Under the FPA, rates cannot be made effective and binding on purchasers in the absence of a filing that specifies the "rate itself." *Electrical Dist. No. 1. v. FERC*, 774 F.2d 490, 492-93 (D.C. Cir. 1985) (Scalia, J.); *see also Pub. Serv. Co. of New Mexico v. FERC*, 832 F.2d 1201, 1223-25 (10th Cir. 1987) (same); *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1141 (D.C. Cir. 1987) (same).[2]

This rule applies not just under the FPA, but across regulated industries. *See Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1521 (D.C. Cir. 1995) (under the Communications Act of 1934 ("CA"), 47 U.S.C. § 203(a)-(b)(1) (2001), a valid tariff must allow the public to "discern the actual rate proposed to be charged. . . ."); *Regular Common Carrier Conference v. U.S.*, 793 F.2d 376, 379-80 (1986) (Scalia, J.) (under the Interstate Commerce Act ("ICA"), 49 U.S.C. § 10762(a)(1) (1994), a tariff "produces a filed rate"

[2] FERC has allowed the use of "formula rates" in certain circumstances, and Congress amended Section 205 to permit the use of a certain type of formula rate known as an "automatic adjustment clause." 16 U.S.C. § 824d(f). Market-based rates are not formula rates, however, as FERC expressly held in this case. *E.g.*, Pet. App. at 40a. And Congress has not amended Section 205 to allow the use of market-based rate tariffs.

only if it states the rate itself, or at least enables the public to determine "how the per-unit rate is determined, enabling them to protest the application").[3]

"The filing requirement, in the first instance, is a notice requirement." *Boston Edison Co. v. FERC*, 856 F.2d 361, 368 (1st Cir. 1988). And the statute specifies what a valid tariff must contain: "all rates" for "any" sale of wholesale power. 16 U.S.C. § 824d(c)-(d). A tariff stating only that a utility's rates will be determined "by agreement" does not pass muster.

Indeed, the D.C. Circuit has ruled that a tariff which contains "nothing more than an offer to negotiate" – like petitioners' market-based rate tariffs – does not produce a filed rate. *Regular Common Carrier Conference*, 793 F.2d at 380; *see* Richard Stavros, *Lost in Translation*, PUBLIC UTILITIES FORTNIGHTLY, June 1, 2004, at 4 (the California Attorney General "argues a valid point: that there really is no 'filed rate' ").

If a market-based rate tariff were, as petitioners contend, a lawful filed rate, sellers could make any number of separate sales to individual buyers at widely

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[3] Courts have long noted that the FPA, the ICA, and the CA provide for "essentially the same form of regulation, the term 'common carrier' being generally used of firms providing transportation or communications and 'public utility' of firms providing electricity or gas. . . ." *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 487 (7th Cir. 1998) (Posner, C.J.); *see also, e.g.*, *Northwestern Pub. Serv. Co. v. Montana-Dakota Utils. Co.*, 181 F.2d 19, 22 (8th Cir. 1950) (holding that the FPA was modeled on the ICA, so "decisions under the latter Act should be controlling here"), *aff'd sub nom. Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951); *American Tel. & Tel. Co. v. FCC*, 487 F.2d 865, 877 (2d Cir. 1973) (noting similarity between rate filing provisions in the NGA and the CA, both of which were modeled on the ICA).

varying prices, without having to individually file their rates under Section 205(d). 16 U.S.C. § 824d(d). *But see Sun Oil Co. v. FPC*, 281 F.2d 275, 278 (5th Cir. 1960) (holding that a rate "change" necessarily occurs "where a contract has, by its terms, expired, and a new contract has been made between the same parties without substantial difference except as to rates"). Such an approach would abrogate the statutory mandates for advance notice of all proposed rates, 16 U.S.C. § 824d(d), and for agency review of proposed rates before they take effect, 16 U.S.C. § 824d(e), and cannot be sustained under the statute or this Court's decisions in *MCI* and *Maislin*.[4]

2. *MCI* and *Maislin* directly conflict with the assumption, integral to the petition, that utilities charged lawful filed rates during the energy crisis. In *MCI*, 512 U.S. 218, the Federal Communications Commission ("FCC") tried to defend a scheme in which "non-dominant" long-distance carriers were permitted to file tariffs at their option. The FCC sought to ensure "just and reasonable" rates by dispensing with rate filings, and instead deciding in advance that a given carrier or class of carriers were

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[4] It makes no difference that petitioners' market-based rate tariffs were accepted for filing without being suspended. *See* Petition at 17-18. In *Security Services*, 511 U.S. at 433, the tariff at issue was "received, accepted, and filed, and never rejected by the ICC." Nonetheless, the Court held the tariff could not be enforced because it failed the "fundamental purpose of tariffs; to disclose the [rates] due to the [utility]." *Id.* at 437. Similarly, petitioners did not file their rates in tariffs (and they did not report their rates after-the-fact, either). Therefore, petitioners cannot invoke the filed rate doctrine as a bar to refund claims in this case. *Id.* at 440-43; *see also, e.g., In re Olympia Holding Corp. v. Frito-Lay, Inc.*, 88 F.3d 952, 961 (11th Cir. 1996) (holding that an otherwise binding tariff which does not give adequate notice of rates is void *ab initio*).

incapable of exercising market power. *Id.* at 221-22. This Court held the scheme violated the text and structure of the FCC's controlling statute because, among other reasons, it provided no means for the public to assert its right to challenge proposed rates under CA Section 204, 47 U.S.C. § 204(a)(1) (2001), which is substantially identical to FPA Section 205(e), 16 U.S.C. § 824d(e). 512 U.S. at 230-31.

MCI followed this Court's earlier decision in *Maislin*, 497 U.S. 116. *Maislin* involved an Interstate Commerce Commission ("ICC") policy allowing common carriers operating in competitive markets to charge privately negotiated, unfiled rates that were lower than rates already on file for the same service. 497 U.S. at 121-22. The ICC argued that "in light of the more competitive environment, strict adherence to the filed rate doctrine is inappropriate and unnecessary. . . ." *Id.* at 134. The Court rejected that argument, holding that compliance with statutory filing requirements is "utterly central to the administration of the [ICA] . . . Without these provisions, it would be monumentally difficult to enforce the requirement that rates be reasonable and non-discriminatory. . . ." *Id.* at 132 (quoting *Regular Common Carrier Conference,* 793 F.2d at 379). More specifically, allowing common carriers to charge privately negotiated, unfiled rates made it "virtually impossible for the public to assert its right to challenge the lawfulness of . . . proposed rates"). *Id.*[5]

[5] This Court expressed "considerable sympathy" with arguments that the rate filing requirement stifles competition. *MCI*, 512 U.S. at 233. But the Court made clear that, "[f]or better or worse, the Act establishes a rate-regulation, filed-tariff system. . . ." *Id.* at 234. It further held that requiring utilities to file their rates in tariffs was "Congress's chosen means of preventing unreasonableness and discrimination in charges," *id.* at 230, and that administrative agencies are "bound, not

(Continued on following page)

FERC's market-based rate regime cannot be distinguished from the FCC's "Permissive Detariffing" rule or the ICC's "Negotiated Rates Policy." There is no meaningful distinction between filing no tariff, on the one hand, and filing a tariff stating only that rates will be determined "by agreement," on the other. Neither FERC nor the public has any advance notice of how much the utility intends to charge any given customer under any given set of market conditions, nor any way to ensure the utility will adhere to the rates supposedly "pre-authorized" (several years in advance and sight unseen) by FERC. *See* Pet. App. at 53a.

After this Court's decision in *MCI*, Congress gave the FCC forbearance authority with respect to the filing requirement, and the FCC prohibited "non-dominant" long-distance carriers from filing tariffs. *See generally MCI Worldcom, Inc. v. FCC*, 209 F.3d 760, 762-63 (D.C. Cir. 2000). Similarly, after this Court's decision in *Maislin*, Congress abolished the ICC and, along with it, the filing

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only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *Id.* at 231 n.4.

Accordingly, cases purportedly holding that competitive market forces can produce "just and reasonable" rates, *see* Petition at 5 n.5 (citing cases), do not control the foundational issue presented by the petition, which is whether market-based rate tariffs produce valid filed rates. Indeed, under *MCI* and *Maislin*, FERC's prior determinations that petitioners and others were incapable of exercising market power, *see* Petition at 18, are "ultimately irrelevant" to whether they charged lawful filed rates during the energy crisis. *Southwestern Bell*, 43 F.3d at 1520.

This Court and others have made clear that the critical inquiry is whether a tariff provides adequate notice of the applicable rate. A market-based rate tariff, however, is a blank slate. There is no filed rate that can be challenged before it takes effect, and no filed rate that can be enforced after it takes effect.

requirement for most segments of the trucking industry. *See generally Olympia Holding Corp.*, 88 F.3d at 955. Congress, however, has not abolished or relaxed the FPA's rate filing requirement, other than to permit the use of automatic adjustment clauses, 16 U.S.C. § 824d(f), which are not at issue here. Unlike the FCC, FERC has no authority to eliminate the filing requirement for utilities deemed to lack market power.

3. The Ninth Circuit rejected the California Attorney General's argument that FERC's filing requirements for market-based rates violate the FPA *per se*. Pet. App. at 12a. But its attempts to reconcile the market-based rate regime with Section 205, and to distinguish *MCI* and *Maislin*, do not succeed. *See* Pet. App. at 10a-11a (holding that the "crucial difference between *MCI*/*Maislin* and the present circumstances is the dual requirement of an ex ante finding of the absence of market power *and* sufficient post-approval reporting requirements") (emphasis in original).

Contrary to the Ninth Circuit's decision, FERC's authority to determine the "form" of "schedules showing all rates," 16 U.S.C. § 824d(c)-(d), does not extend so far as to permit the use of schedules showing no rates at all. Pet. App. at 11a. FERC has some authority to prescribe the contents of filed tariffs, *MCI*, 512 U.S. at 234; *see also, e.g.*, *City of Cleveland v. FERC*, 773 F.2d 1368 (D.C. Cir. 1985) (Scalia, J.),[6] but it cannot eliminate the express requirement that tariffs filed under Section 205 show all rates for

[6] The court held there that FERC has discretion to determine which "practices ... affecting such charges and rates," 16 U.S.C. § 824d(c)-(d), must be filed in tariffs. 773 F.2d at 1372.

each and every sale of wholesale power. *See United Gas Pipeline Co. v. Mobile Gas Serv. Co.*, 350 U.S. 332, 339 (1956) (holding that "individual contracts . . . must be filed with the Commission and made public"). As this Court held in *Maislin*, 497 U.S. at 135, an agency has no power to "adopt a policy that directly conflicts with its governing statute."

Further, contrary to the Ninth Circuit's decision, FERC's authority to prescribe the time in which rates must be filed, 16 U.S.C. § 824d(c), does not convert petitioners' market-based rate tariffs to valid filed rates, on the theory that post-performance, transaction-specific reporting "completes" the filing. Under Section 205 and FERC's own regulations, all rates must be filed at least sixty days "*in advance* of the commencement of jurisdictional service." *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at p. 61,173 (1993) (emphasis added).

Further, if sellers could publicize their rates months after charging and collecting them, the public would have no means of challenging rates *before* they take effect under Section 205(e). 16 U.S.C. § 824d(e). As this Court held in *MCI*, 512 U.S. at 230-231, such a scheme cannot be reconciled with the text, structure, or legislative history of the FPA. There is no way to suspend and thereby "defer the use" of a rate several months *after* it has been charged and collected. 16 U.S.C. § 824d(e); *see also, e.g., Maislin*, 497 U.S. at 132 (holding that "the ICC cannot review in advance the reasonableness of *unfiled* rates") (emphasis in original).

For this reason, the scheme violates the FPA, regardless of whether post-performance, quarterly reporting is

viewed as an "integral part" of a seller's filed rate, as the Ninth Circuit held, Pet. App. at 15a, or merely as an "informational" requirement, as petitioners contend. The procedures established by Congress for reviewing the legality of proposed rates expressly require advance filing, and cannot function properly without advance filing. *See* 16 U.S.C. § 824d(d) (requiring sixty days notice before proposed rates may go into effect); *id.* at § 824d(e) (authorizing FERC to "suspend" and thereby "defer the use" of proposed rates for up to five months beyond the time they would otherwise go into effect). FERC has no authority to eliminate the FPA Section 205 requirement that rates be filed in advance on the grounds that a public utility may be incapable of exercising market power.

For the foregoing reasons, granting review without granting the cross-petition could risk a decision that conflicts with *MCI*, *Maislin*, and the FPA itself.

CONCLUSION

If the Court were to grant the petition, it should also grant the California Attorney General's cross-petition.

Dated: February 5, 2007

Respectfully submitted,

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47 U.S.C. § 203. Schedules of charges

(a) Filing; public display

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

* * *

47 U.S.C. § 204. Hearings on new charges; suspension pending hearing; refunds; duration of hearing; appeal of order concluding hearing

(a)(1) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or a revised charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or revised charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charge as by its decision shall be found not justified. At any hearing involving a new or revised

charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(2)(A) Except as provided in subparagraph (B), the Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 5 months after the date that the charge, classification, regulation, or practice subject to the hearing becomes effective.

(B) The Commission shall, with respect to any such hearing initiated prior to November 3, 1988, issue an order concluding the hearing not later than 12 months after November 3, 1988.

(C) Any order concluding a hearing under this section shall be a final order and may be appealed under section 402(a) of this title.

* * *

49 U.S.C. § 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a household goods freight forwarder providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of that chapter,

respectively, may not become effective for 30 days after it is filed.

* * *

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No. 06-1100

IN THE
Supreme Court of the United States

STATE OF CALIFORNIA EX REL.
EDMUND G. BROWN, JR., ATTORNEY GENERAL,
Cross-Petitioner,

v.

CORAL POWER, L.L.C., ET AL.,
Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should review the court of appeals' holding, which conflicts with no decision of any circuit or this Court, that the Federal Energy Regulatory Commission has complied with the Federal Power Act in authorizing the sale of wholesale electricity at market prices.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, cross-respondents Coral Power, L.L.C., AES Placerita, Inc., Powerex Corp., PPL EnergyPlus, LLC, PPL Montana, LLC, Public Service Company of New Mexico, Puget Sound Energy, Inc., Sempra Energy Solutions LLC, Sempra Energy Trading Corp., and Sempra Generation state the following:

Coral Power, L.L.C. is owned by Coral Energy Holding, L.P., which is indirectly owned by Shell Oil Company. Shell Oil Company is owned by Royal Dutch Petroleum Company, which in turn is owned by Royal Dutch Shell plc, a publicly traded corporation. Royal Dutch Shell plc has no parent company, and no publicly held company owns 10% or more of its stock.

AES Placerita, Inc. is a wholly owned subsidiary of The AES Corporation. AES Placerita, Inc. has its principal offices in Newhall, California. The AES Corporation is a publicly traded Delaware corporation with its principal executive offices located in Arlington, Virginia. The AES Corporation has no parent company, but approximately 16% of its stock is owned by Legg Mason Capital Management, Inc. ("LMCM"). LMCM is not a publicly traded company, but it is wholly owned by Legg Mason Inc. ("LMI"), which is a publicly traded company. LMI has no parent company, and no publicly held company owns 10% or more of its stock.

Powerex Corp. is a Canadian corporation incorporated under British Columbia's Company Act. Powerex is wholly owned by the British Columbia Hydro and Power Authority, which is a Provincial Crown Corporation owned in its entirety by Her Majesty the Queen in right of the Province of British Columbia. No publicly held company owns any Powerex stock.

PPL EnergyPlus, LLC and **PPL Montana, LLC** are wholly owned, indirect subsidiaries of PPL Corporation, whose shares are publicly traded. PPL Corporation has no parent company, and no other publicly held company

has a 10% or greater ownership interest in PPL Energy-Plus, LLC, PPL Montana, LLC, or PPL Corporation.

Public Service Company of New Mexico ("PNM") is a corporation organized and existing under the laws of the State of New Mexico, and is engaged primarily in the generation, transmission, distribution, and sale of electricity and in the transmission, distribution, and sale of natural gas within the State of New Mexico. PNM is a wholly owned subsidiary of PNM Resources, Inc. ("PNM Resources"), which is a corporation organized and existing under the laws of the State of New Mexico. PNM Resources is a publicly traded company and has issued securities to the public. Other than PNM Resources, PNM has one affiliate, Texas-New Mexico Power Company, that has issued shares or debt securities to the public.

Puget Sound Energy, Inc. is an electric and natural gas utility with its principal office in Bellevue, Washington. Its parent company is Puget Energy, Inc. Puget Energy, Inc. owns 100% of Puget Sound Energy, Inc.'s common stock. Puget Energy, Inc. has no parent corporations and is not aware of any publicly held company that owns 10% or more of its outstanding stock.

Sempra Energy Solutions LLC and **Sempra Generation**: Both Sempra Energy Solutions LLC ("SES") and Sempra Generation are indirect wholly owned subsidiaries of Sempra Energy, a publicly held corporation. No other publicly held company has a 10% or greater ownership interest in each of Sempra Generation, SES, or Sempra Energy. Sempra Generation acquires, develops, and operates power plants and energy infrastructure, and markets at wholesale the output from power plants, for the competitive market. SES is a retail provider of natural gas and electricity to commercial and industrial customers throughout the United States in markets that offer retail choice.

Sempra Energy Trading Corp. ("SET") is a corporation organized and existing under the laws of the State of Delaware. Its principal office is located at 58 Commerce Road, Stamford, Connecticut 06902. SET is a full-service energy trading company that markets and trades physical and financial energy and metals products, including electric energy and power, natural gas, crude oil, base metals, and associated commodities. SET is a wholly owned indirect subsidiary of Sempra Energy, whose shares are publicly traded. No other publicly held company has a 10% or greater ownership interest in SET or Sempra Energy.

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INTRODUCTION

Coral Power, L.L.C. and other parties to the proceedings below (collectively, "petitioners") have sought this Court's review of a narrow but important question on which the circuits are in conflict: whether the Federal Energy Regulatory Commission ("FERC" or "the Commission") has authority to order retroactive refunds when the carefully limited provisions in §§ 205(e) and 206(a) of the Federal Power Act ("FPA") do not apply. In finding that FERC does have that power, the Ninth Circuit awarded California essentially all of the relief that it sought in its petition for review of FERC's order – that is, an opportunity to pursue retroactive refunds from those participants in California's wholesale electricity markets that it has not already pressed into settlements.

Not content with that sweeping (and unprecedented) victory, California has filed this conditional cross-petition, which presents a frontal assault on the Commission's longstanding practice of approving market-based rate tariffs. But *no court* has accepted California's contention that the Commission has violated the FPA in approving tariffs that permit prices for wholesale electricity to be set in the market. Instead, *every court* to have opined on the issue has reached the same conclusion as the court of appeals in this case – FERC's market-based rate regime comports with the FPA. *See Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870-71 (D.C. Cir. 1993); *see also Town of Norwood v. New England Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000). That unanimity is not surprising given the widespread acceptance of market-based rates around the country. Indeed, there is no small irony in California's Attorney General now arguing to invalidate the Commission's market-based rate tariffs, because in the mid-1990s the California legislature restructured the State's electric power industry based on the existence of markets for trading wholesale electricity under those tariffs, and it has not abandoned that structure. *See California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 835 (9th Cir.) (describing California's "aggressive market

experiment"), *amended on other grounds on denial of reh'g*, 387 F.3d 966 (9th Cir. 2004), *cert. denied*, 544 U.S. 974 (2005).

Because the court of appeals correctly rejected California's challenge to the Commission's approval of market-based rate tariffs and that holding conflicts with no decision of this Court or another court of appeals, certiorari is unwarranted and the cross-petition should be denied. The Court regularly denies cross-petitions that do not independently warrant certiorari in cases in which it grants the main petition,[1] and there is no reason for a different result here.

STATEMENT OF THE CASE

The legal, factual, and procedural background of this case is discussed at length in the petition in No. 06-888 (at 3-16). While we do not repeat that detail here, we briefly describe the FPA, the Commission's market-based rate regime, and pertinent procedural history.

The FPA. The FPA requires that "[a]ll rates . . . made, demanded, or received" by sellers of wholesale electricity be "just and reasonable" and not unduly discriminatory. FPA § 205(a)-(b), 16 U.S.C. § 824d(a)-(b). Sellers must file, "[u]nder such rules and regulations as the Commission may prescribe" and "within such time and in such form as the Commission may designate," "schedules" showing rates for sales of wholesale electricity. FPA § 205(c), *id.* § 824d(c). Sellers also must provide FERC with notice of any proposed change in a filed rate. *See* FPA § 205(d), *id.* § 824d(d). The Commission has discretion to investigate the lawfulness of a proposed rate change, to suspend the effectiveness of the proposed rate

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[1] *E.g.*, *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 191 n.10 (1999); *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110 n.2 (1998); *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 711 n.10 (1998); *see NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (cross-petition presenting a question of fact not meriting the Court's review was improvidently granted).

pending administrative review, and – when the proposed rate takes effect after a period of suspension but before the conclusion of FERC's investigation – to order refunds for sales occurring during the period of review. *See* FPA § 205(e), *id.* § 824d(e). *See generally City of Winnfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984) (Scalia, J.) (under § 205, FERC plays a "reactive role").

FERC also has authority to initiate a hearing – on complaint or on its own motion – to investigate whether a new or existing rate is unjust, unreasonable, or unduly discriminatory. *See* FPA § 206(a), 16 U.S.C. § 824e(a). If FERC finds that it is, the Commission must take prospective action, such as determining a "just and reasonable rate . . . to be thereafter observed and in force." *Id.* In addition to setting a rate "to be thereafter observed," FERC has discretion to order a seller to refund the difference between the existing rate and the rate that FERC determines is just and reasonable. *See* FPA § 206(b), *id.* § 824e(b). But FERC's refund authority is confined to sales that occurred *after* the statutory "refund effective date," which at the time at issue in this case could be no earlier than 60 days after either the filing of the complaint or the publication of the Commission's decision to initiate an investigation. *See* 16 U.S.C. § 824e(b) (2000); *see also* Pet. App. 53a ("section 206 bars retroactive refund liability").[2]

Market-Based Rate Tariffs. FERC allows utilities to sell wholesale power at the market price – that is, in transactions between willing buyers and sellers. The Commission's market-based rate regime developed over time, as reduced barriers to entry in the market for generation of electricity and nondiscriminatory access to transmission lines combined to facilitate effective competition in the market for wholesale electricity. *See generally New York v. FERC*, 535 U.S. 1, 7-12 (2002); The Electric Energy Market Competition Task Force, *Report to*

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[2] Citations to "Pet. App." refer to the petition appendix in No. 06-888.

Congress on Competition in Wholesale and Retail Markets for Electric Energy 19-25 (Apr. 2007) ("*Competition Report*"), *available at* http://www.ferc.gov/legal/maj-ord-reg/fed-sta/ene-pol-act/epact-final-rpt.pdf. FERC continues to refine and improve that regime. *See* Order Dismissing Complaints, *CAlifornians for Renewable Energy, Inc.*, 119 FERC ¶ 61,058, at ¶¶ 31-40 (2007) (describing numerous improvements that the Commission has made to its market-based rate regime since 2001).

Before authorizing a seller to make any sales under a market-based rate tariff, the Commission requires the seller to "establish that it, and its affiliates, either do not have, or have adequately mitigated, market power." *Grand Council of Crees v. FERC*, 198 F.3d 950, 953 (D.C. Cir. 2000); *see Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173, 176 (D.C. Cir. 1994) (per curiam). That requirement is the key to the Commission's market-based rate regime. As courts have recognized, FERC's determination that a seller lacks market power – a determination that must be made before the seller is authorized to conduct transactions at the market rate – establishes that the forces of supply and demand in a properly regulated market will assure that the seller's rates are just, reasonable, and not unduly discriminatory, as required by § 205(a) and (b). *See, e.g., Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998) ("Where there is a competitive market, [FERC] may rely on market-based rates in lieu of cost-of-service regulation to ensure that rates satisfy [§ 205(a)'s just-and-reasonable-rate] requirement."); *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) ("[i]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable").[3]

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[3] *See also, e.g., FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979) ("Commission is not required to adhere rigidly to a cost-based determination of rates, much less to one that base[s] each producer's rates on his own costs"; "courts are without authority to set aside any rate adopted by the Commission which is within a zone of reason-

The Commission continues to examine and to refine its market-power analysis. *See* Notice of Proposed Rulemaking, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 71 Fed. Reg. 33,102 (2006) (proposing to amend the Commission's regulations to codify and to refine the standards for granting market-based rate authority).

Under FERC's market-based rate regime, a potential seller files an application to transact at market-based rates. In the case of an applicant that has an existing rate schedule on file with the Commission, the application notifies FERC of the seller's intent to change its rate from a cost-based rate to a market-based rate, as required by § 205(d). The Commission notifies the public of the seller's application and accepts public comments on it. When FERC approves a seller's application, it issues an order, of which aggrieved parties can obtain judicial review. *See, e.g., Louisiana Energy & Power Auth.*, 141 F.3d at 366-69.

As part of a seller's application, the seller tenders for filing a proposed rate schedule "authorizing it to sell power at market-based rates." *Grand Council of Crees*, 198 F.3d at 953. Once FERC decides that the seller lacks market power (and meets the Commission's other requirements), the Commission "accept[s] for filing, without suspension or hearing, [the seller's] application . . . to transact . . . at market-based rates." *British Columbia Power Exchange Corp.*, 80 FERC ¶ 61,343, at 62,136 (1997). The seller's rate schedule is placed on file with FERC, as required by § 205(c). *See Public Util. Dist. No. 1 of Snohomish County v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 760 (9th Cir. 2004) (market-based rate tariff "'preauthorizes the seller to engage in market-based sales and puts the public on notice that the seller may do so'") (quoting Pet. App. 43a),

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ableness") (alteration in original; internal quotation marks omitted); *Wisconsin v. FPC*, 373 U.S. 294, 309 (1963) ("[i]t has repeatedly been stated that no single method need be followed by the Commission in considering the justness and reasonableness of rates").

cert. denied, 125 S. Ct. 2957 (2005); *PacifiCorp v. Reliant Energy Servs., Inc.*, 105 FERC ¶ 61,184, at 61,972 (2003) ("market-based rate authorizations satisfy the FPA Section 205(c) requirement that rates be on file with the Commission"). Because FERC does not authorize a seller to transact at market-based rates until after it has completed its administrative review, § 205(e)'s provision for refunds on sales occurring during the review period does not apply.[4]

During the period at issue in this petition, FERC's orders granting authority to sell at market-based rates generally required sellers to submit periodic reports on their market power and their transactions in the market. Quarterly transaction reports included, among other things, information on participants in the transactions, the type of power sold, and the price at which that power was sold. *See Citizens Power & Light Corp.*, 48 FERC ¶ 61,210, at 61,778 (1989); *see also* 18 C.F.R. § 35.10b (reporting regulation adopted after events at issue here). The Commission also required sellers either to inform it of any changes implicating their ability to exercise market power or to file a new analysis of their market power every three years. *See, e.g., GPU Advanced Resources, Inc.*, 80 FERC ¶ 61,255, at 61,928 (1997); 18 C.F.R. § 35.27(c) (reporting regulation adopted after events at

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[4] The Commission *could* make a utility's market rate effective subject to refund under § 205(e), but it instead chooses to authorize sales at that rate only after it has completed its investigation of the justness and reasonableness of that proposed rate. *See* Pet. App. 41a ("In the case of market-based rates, the just and reasonable standard of FPA § 205(e) is satisfied by the Commission's determination, prior to the effectiveness of those rates, that the utility (and its affiliates) lacks market power or has taken sufficient steps to mitigate market power."). (Although the § 205(e) procedure is unnecessary under the Commission's market-based rate regime, the Commission's orders approving market-based rate applications sometimes grant requests to waive FERC's notice requirement, making a seller's market-based rate schedule effective after its application is filed but before the date of the order approving the application. *See, e.g., British Columbia Power Exchange*, 80 FERC ¶ 61,343, at 62,141.)

issue here; requires timely reporting of "any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority").

FERC uses that reported information to monitor the seller's ability to exercise market power and to decide whether to open an investigation under FPA § 206. *See Chicago Energy Exchange of Chicago, Inc.*, 51 FERC ¶ 61,054, at 61,112-13 (1990) (requiring "quarterly informational filings" "to monitor for potential market power problems"); *Citizens Power & Light*, 48 FERC ¶ 61,210, at 61,778 (requiring "informational filings . . . to monitor [the seller's] ability to exercise market power"); p. 3, *supra*. If FERC finds that the seller has gained market power, then FERC can order prospective modifications to the seller's tariff (including revoking the seller's market-based rate authority, as it did in the case of Enron[5]), and it can require a seller to pay refunds, subject to the limitations of FPA § 206. *See* Pet. App. 44a-45a.

Procedural History. In March 2002, California filed with FERC a complaint against sellers of wholesale electricity in California during 2000 and 2001. As relevant here, California argued that the market-based rate tariffs under which those sellers operated during that time period were unlawful under the FPA because they did not permit FERC to determine, before each transaction occurred, whether the actual market price at the time was just and reasonable. California sought an order requiring sellers to refund the difference between prices for those sales and prices that FERC determines would have been just and reasonable.

FERC rejected California's challenge to the legality of its market-based rate system. The Commission explained that "[t]he prerequisite for approval of market-based rates is a finding that the seller lacks or has mitigated its mar-

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[5] *E.g.*, Order Revoking Market-Based Rate Authorities and Terminating Blanket Marketing Certificates, *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,343 (2003), *reh'g denied*, 106 FERC ¶ 61,024 (2004).

ket power in the relevant market" and that, "[s]o long as a seller lacks market power and thus buyers have alternatives, market-based rates will meet the just and reasonable standard." Pet. App. 39a; *see id.* at 41a-43a. It reasoned that market-based rate tariffs satisfy § 205(c)'s filing requirement because "the on-file market-based umbrella tariff (which was the subject of Commission approval) preauthorizes the seller to engage in market-based sales and puts the public on notice that the seller may do so." *Id.* at 43a; *see id.* at 45a-46a & n.40, 53a. FERC further explained that the quarterly transaction reports provided "an efficient and adequate means for the Commission and the public to examine on a continuing basis whether a seller and its affiliates lack market power" and to identify "pricing trends, discriminatory patterns, or other indicia of the exercise of market power." *Id.* at 42a; *see id.* at 43a-44a; *see also id.* at 48a (transaction reports do not "establish the market rate," but "are an important tool in assuring that a seller's use of market-based rates remains reasonable").

California petitioned for rehearing, which FERC denied. The Commission reaffirmed that its market-based rate regime comports with the FPA. *See id.* at 68a-69a & n.12.

California petitioned for review in the Ninth Circuit under FPA § 313(b), 16 U.S.C. § 825*l*(b). The court of appeals upheld FERC's authorization of market-based rate tariffs, concluding that those tariffs do not violate the FPA because FERC determines that the seller lacks market power and requires the seller to report on its transactions. *See* Pet. App. 9a-11a.

After the time for filing a certiorari petition had run but within the time for filing a conditional cross-petition under this Court's Rule 12.5, California filed a conditional cross-petition. Under this Court's rules, a conditional cross-petition "will not be granted unless another party's timely petition for a writ of certiorari is granted." Sup. Ct. R. 13.4. Thus, if the petition in No. 06-888 is not granted, then this cross-petition must be denied as well.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

Although the Court should grant the petition in No. 06-888, it should deny California's conditional cross-petition for four complementary reasons. *First*, no decision of a court of appeals or of this Court conflicts with the Ninth Circuit's holding that the Commission's market-based rate regime comports with the FPA. On the contrary, courts have uniformly rejected similar challenges. *See Elizabethtown Gas*, 10 F.3d at 870-71; *see also Town of Norwood*, 202 F.3d at 419. Thus, there is no conflict that might warrant certiorari. *See* Sup. Ct. R. 10(a), (c).

Second, the court of appeals correctly concluded that FERC's market-based rate system does not violate the FPA, and Congress ratified that system when it enacted the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594. Multiple provisions of that Act would make no sense if, as California claims, Congress has prohibited the Commission from approving market-based rate tariffs.

Third, contrary to California's claims, resolving the question presented in the principal petition does not require addressing the question presented in the cross-petition. The petition requires resolution only of an important, but far narrower, question: whether the Ninth Circuit disregarded Congress's considered decision to deny FERC a power to order retroactive refunds for unjust and unreasonable charges in every case. The Court can resolve that straightforward question of statutory interpretation without deciding whether market-based rate tariffs satisfy FPA § 205(c).

Fourth, prohibiting the Commission from approving market-based rate tariffs would undermine the Nation's short-term wholesale electricity markets, to consumers' detriment.

A. No Court Has Questioned The Legality Of The Commission's Market-Based Rate Regime

1. California claims that the court of appeals' holding that the Commission's approval of market-based rate

tariffs comports with the FPA conflicts with two of this Court's decisions involving other industries, *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994). That is incorrect. Both of those cases involved fundamentally different agency actions and statutory schemes.

In *Maislin*, the Court struck down an Interstate Commerce Commission ("ICC") policy that prevented common carriers from recovering from shippers the filed rate, when the parties had privately negotiated a lower rate that was not on file with the ICC. *See* 497 U.S. at 130-32. The Court held that the ICC's policy of enforcing unfiled, privately negotiated rates over filed rates "undermines the basic structure of the [Interstate Commerce Act ("ICA")]," *id.* at 132, which "forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate," *id.* at 130. Thus, the problem in *Maislin* was not that the rates were set by the parties' negotiation – it was that those rates differed from the rate on file with the agency. Here, by contrast, sellers charge only the rates set forth in their rate schedules – that is, the market rate – and they do so pursuant to a FERC regulatory regime that ensures the absence of market power that could be abused in the kind of secret transactions at issue in *Maislin*.

In *MCI*, the Court invalidated the Federal Communications Commission's ("FCC") "permissive detariffing" policy, under which the FCC exempted "non-dominant" carriers from the tariff-filing requirement of the Communications Act of 1934. 512 U.S. at 221. As in *Maislin*, the agency's policy eliminated "the heart of the common-carrier section of the Communications Act" – the tariff-filing requirement, *id.* at 229 – and therefore could not be justified by the FCC's statutory authority to "modify" the statute's requirements. *See id.* at 229-32.

In contrast to the FCC in *MCI*, FERC has not eliminated the FPA's filing requirement. Under FERC's

market-based rate regime, electricity sellers must file and abide by market-based rate tariffs. And, before accepting those tariffs, the Commission ensures that the applying sellers lack market power. Further, after sellers obtain authority to sell at market-based rates, they must comply with a host of regulatory requirements – including reporting on their market power and information about their market transactions (including prices). *See* 18 C.F.R. §§ 35.10b, 35.27(c). Far from having "deregulate[d] the [wholesale power] industry," *MCI*, 512 U.S. at 220, FERC exercises substantial regulatory oversight. *See* Pet. App. 10a-11a.[6]

Furthermore, unlike the statutes at issue in *Maislin* and *MCI*, the "heart" of the FPA is the integrity of privately negotiated contracts, not the tariff-filing requirement.[7] Congress enacted the ICA, which it has since repealed, at a time when non-uniformity of price was the rule among common carriers. The "great purpose" of the ICA was "to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, . . . to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and

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[6] California wrongly suggests (at 7 n.4) that the Commission's market-based regime conflicts with *Security Services, Inc. v. Kmart Corp.*, 511 U.S. 431 (1994). The *Kmart* Court held that the tariff in that case was not on file by operation of an ICC regulation, which invalidated a carrier's tariff if that tariff referenced another tariff in which the carrier no longer participated. *See id.* at 436. Unlike the ICC in *Kmart*, however, FERC has held that sellers' market-based rate tariffs are valid, *see, e.g.*, Pet. App. 53a, and no Commission regulation suggests anything to the contrary. Nor does *Whitaker v. Frito-Lay, Inc. (In re Olympia Holding Corp.)*, 88 F.3d 952 (11th Cir. 1996), pose a conflict; the court held that the tariffs in that case *did* "comply with the ICA's requirement that carriers file their 'rates.'" *Id.* at 961.

[7] *See, e.g., Boston Edison Co. v. FERC*, 856 F.2d 361, 370 (1st Cir. 1988) ("[A] salient purpose of the Federal Power Act was to preserve the 'integrity of contracts, . . . [thereby permitting] the stability of supply arrangements.'") (quoting *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956)) (second and third alterations in original).

forbidding rebates, preferences and all other forms of undue discrimination." *New York, N.H. & H.R.R. Co. v. ICC*, 200 U.S. 361, 391 (1906). The ICA "in effect *precludes private rate agreements* by its requirement that the rates to all shippers be uniform." *Mobile*, 350 U.S. at 338 (emphasis added); *see id.* at 345. Similarly, under the Communications Act, "[t]he requirements . . . that common carriers file their rates with the [FCC] and charge only the filed rate were the centerpiece of the Act's regulatory scheme." *MCI*, 512 U.S. at 220.

While the ICA may have been "the model for" the FPA and the Natural Gas Act ("NGA"), *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 478 n.3 (2002), the FPA and the NGA erected fundamentally distinct regulatory regimes. In those statutes, "Congress departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting." *Id.* at 479.[8] Congress did so because it recognized that, "[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who [can] be expected to negotiate a 'just and reasonable' rate as between the two of them." *Id.*; *see Mobile*, 350 U.S. at 345 (NGA "recognizes the need for private contracts of varying terms"); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956) (*Mobile*'s interpretation of the NGA applies equally to the FPA).[9] The FPA and the NGA therefore "expressly recognize[] that rates to particular customers may be set by individ-

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[8] *See Towns of Concord, Norwood, and Wellesley v. FERC*, 955 F.2d 67, 73-74 (D.C. Cir. 1992) ("*unlike the Federal Power Act*, the Interstate Commerce Act also explicitly provides that a 'carrier may not charge or receive a different compensation . . . than the rate specified in the tariff'") (quoting the ICA) (alteration in original; emphasis added).

[9] *Cf. Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 258 (1951) (Frankfurter, J., dissenting) (recognizing that, in passing the FPA, Congress "apparently" concluded that wholesale buyers of electric energy were adequately protected without a general provision for retroactive refunds of unreasonable charges).

ual contracts," *Mobile*, 350 U.S. at 338, and that the Commission's role is largely supervisory, *see id.* at 341-43. Under those statutes, "all rates are established initially by the [utilities], by contract or otherwise," and the Commission's "basic power" is "to review rates and contracts made in the first instance by [utilities] and, if they are determined to be" unjust, unreasonable, or discriminatory, "to set [them] aside and modify" them. *Id.* at 341.[10]

2. California also asserts (at 5-6) that the decision below conflicts with *Electrical District No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985) (Scalia, J.), and *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986) (Scalia, J.) ("*RCCC*"), but neither is on point.

First, *Electrical District* and its progeny[11] did not adopt the interpretation of § 205(c) that California urges here. Instead, those cases involved "what it means to 'fix' a rate within the meaning of" § 206 of the FPA, a different provision of the Act that allows FERC to modify rates that have become unjust and unreasonable. 774 F.2d at 492. In *Electrical District*, the D.C. Circuit held that the Commission had not "fixed" a rate under § 206 merely by issuing an order prescribing the principles governing the determination of the rate. *See id.* at 492-93. The principal defect in the FERC practice at issue in *Electrical District* was that the Commission attempted to make a rate effec-

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[10] *See Mobile*, 350 U.S. at 343 ("[T]he Act presumes a capacity in [utilities] to make rates and contracts and to change them from time to time . . . . The obvious implication is that, except as specifically limited by the Act, the rate-making powers of [utilities] were to be no different from those they would possess in the absence of the Act: to establish *ex parte*, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer.").

[11] *See Public Serv. Co. of New Mexico v. FERC*, 832 F.2d 1201, 1223, 1225 (10th Cir. 1987) (applying *Electrical District*); *see also Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1141 (D.C. Cir. 1987) (quoting from *Electrical District* in explaining "the rationale for prohibiting retroactive increases in filed rates").

tive *before* the utility had filed the rate schedule. *See id.* at 491; *Public Serv. Co. of New Mexico*, 832 F.2d at 1223 & n.22; *see also Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 577 (D.C. Cir. 1990) ("In *Electrical District* the Commission sought to make a rate effective under [§ 206] as of the date it *ordered* the [utility] to make a compliance filing rather than the date on which the Commission *accepted* the compliance filing."). That defect is not present in FERC's market-based rate system because utilities are not authorized to transact at market-based rates before their market-based rate schedules have been accepted for filing.

Moreover, the D.C. Circuit has clarified that it does not require that a rate schedule specify a "numerical rate." *Electrical District*, 774 F.2d at 492.[12] In *Transwestern Pipeline*, the court explained that the Commission "need not confine rates to specific, absolute numbers"; rather, FERC "may approve a tariff containing a rate 'formula' or a rate 'rule.'" 897 F.2d at 578. But FERC may not "simply announce some formula and *later* reveal that the formula was to govern from the date of announcement (as it had done in *Electrical District*)." *Id.* Thus, "where the

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[12] California's current insistence that the FPA prohibits a tariff that does not contain a numerical price conflicts with its representation in its complaint that it "does not contend that market-based pricing per se violates the FPA." Compl. at 13. California there stated that the Commission "may institute a system where rates are determined by negotiation between buyers and sellers, so long as rates do not exceed a cap lawfully established by FERC." *Id. But see Competition Report* at 5 (price caps can "limit legitimate scarcity pricing and impede incentives to build generation in the face of scarcity"); *id.* at 80 (price caps may "deter suppliers from making needed investments in new capacity" and "limit[] recovery of legitimate costs and delivery of adequate returns"). If, as California now claims, negotiated rates do "not pass muster," Cross-Pet. 6, it is difficult to see how the market-based system it proposed in its complaint could satisfy its view of the statute. In any event, if this Court were inclined to consider the legality of FERC's market-based rate regime, it should wait for a case in which the petitioner definitively seeks a return to fixed, cost-based rates and is not a State whose electric energy industry depends on the existence of market-based rate tariffs and that seeks refunds and rate caps.

Commission explicitly adopts a formula and indicates when it will take effect, courts may not (without invading the Commission's province) say that such a formula may never qualify as a 'rate' within the meaning of" § 205. *Id.* (citing *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).[13]

Second, *RCCC* is likewise inapposite. There, the court held that the ICC violated the ICA when it allowed freight forwarders to charge unpublished rates; neither the buyer nor the public could ascertain how those rates were determined or whether they were determined in the same manner for all buyers. *See* 793 F.2d at 378-79.[14] The same cannot be said of market-based rate tariffs because competitors and customers alike know that prices will be set by the market. *See, e.g.*, Pet. App. 43a ("[T]he on-file market-based umbrella tariff (which was the subject of Commission approval) preauthorizes the seller to engage in market-based sales and puts the public on notice that the seller may do so.").

Furthermore, *RCCC* involved the ICA, which – by insisting on uniformity – absolutely forbade private rate agreements. *See Mobile*, 350 U.S. at 338. In contrast, the FPA encourages private contracts. *See Verizon*, 535 U.S. at 479. And the Commission engages in extensive market regulation (by ensuring that sellers lack market power before they enter the market and that they do not later

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[13] The court also noted that *Columbia Gas* was not controlling insofar as it relied on *Electrical District* in "suggest[ing] that a rate violates the filed rate doctrine simply because a customer cannot respond in some way that enables it to escape the charge" (such as by passing it on to a customer down the distribution chain). *Transwestern Pipeline*, 897 F.2d at 579.

[14] Notably, and in contrast to the FPA administered by FERC, the ICA, before it was repealed in large part in 1995, specified that "[a] rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission . . . shall be stated in money of the United States." 49 U.S.C. § 10762(a)(2) (1994).

gain such power) to ensure that the prices in those contracts are just and reasonable.

In sum, California's claims of conflicts cannot obscure the plain fact that no court has questioned the legality of FERC's market-based rate regime.

B. Congress Has Removed Any Doubt About The Legality Of FERC's Market-Based Rate Regime

As the Commission explains in its brief in opposition (at 18-20), FERC's market-based rate regime satisfies all of the FPA's requirements, and the court of appeals therefore correctly rejected California's challenge to the legality of that regime. In addition, even if there had been any doubt about the Commission's authority to approve market-based rate tariffs, Congress eliminated that doubt when it enacted the Energy Policy Act of 2005 ("EPA").[15]

That Act contains multiple provisions that make sense only if the Commission's market-based rate regime is valid. Most notably, Congress established a special remedial provision for sales of wholesale electricity prior to June 20, 2001, if the Commission "revoked the seller's authority to sell any electricity *at market-based rates*." EPA § 1290(a)(2), 119 Stat. 983-84 (emphasis added). That provision plainly targets sellers (such as Enron) that lose their market-based rate authority through punitive action by the Commission. *See* Order Revoking Market-Based Rate Authorities and Terminating Blanket Marketing Certificates, *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,343 (2003), *reh'g denied*, 106 FERC ¶ 61,024 (2004). The provision would make no sense if the Commission is required to revoke *all* sellers' market-based rate tariffs because those tariffs conflict with FPA § 205. Instead, that provision confirms the Commission's authority to approve market-based rate tariffs under the FPA.

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[15] The Commission has recognized Congress's ratification of its market-based rate regime. *See* Brief for Respondent FERC at 47-50, *Colorado Office of Consumer Counsel v. FERC*, No. 04-1238 (D.C. Cir. filed Jan. 9, 2007).

Congress also adopted a prohibition on "Market Manipulation" that is essentially based on fraud and scienter in, among other things, market-based transactions. Congress made it "unlawful for any entity . . . to use or employ, in connection with the purchase or sale of electric energy . . . , any manipulative or deceptive device or contrivance." EPA § 1283, 119 Stat. 979. That provision similarly confirms the legitimacy of FERC's market-based rate regime because a prohibition on market manipulation presumes the existence of rates set in a market.

Other provisions of the Act are to the same effect. Congress adopted a new provision ("Electricity Market Transparency Rules") that directs FERC to take actions to "facilitate price transparency in *markets* for the sale and transmission of electric energy." *Id.* § 1281, 119 Stat. 978 (emphasis added). And Congress provided the Commission with new enforcement authority over entities that make "short-term sale[s] of electric energy through an *organized market* in which the rates for the sale[s] are established by Commission-approved tariff." *Id.* § 1286, 119 Stat. 981 (emphasis added).

When Congress is fully aware of an agency's regulatory regime and legislates "against the background" of "repeated[] and consistent[]" agency action, its legislation may "effectively ratif[y]" the agency's regime. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155-56 (2000); *see Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983). The Commission has been approving market-based rate tariffs for more than a decade, and Congress has been well aware of that practice.[16] Thus,

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[16] *See, e.g., California Energy Markets – Refunds and Reform: Hearing Before the Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the H. Comm. on Government Reform*, 108th Cong. 41 (2003) (testimony of FERC Chairman that, "since 1992, people have come in and asked for and in most cases been granted the authority to sell power at market-based rates, i.e., what the market will bear"), *available at* http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.120&filename=87231.pdf&directory=/diskb/wais/data/108_house hearings; *Joseph T. Kelliher Nomination: Hear-*

when Congress legislated against that background and presumed the validity of market-based rates in the EPA, it "effectively ratified" the Commission's market-based rate regime. *Brown & Williamson*, 529 U.S. at 156; *see Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 595-96 (1980) (statutory interpretation "buttressed" by the facts that "the agency has consistently interpreted the Act to permit [certain transactions]" and, "[m]ore importantly," that "Congress seems clearly to have contemplated [those] transactions").

C. Resolution Of The Question Presented In The Petition Does Not Require Consideration Of The Question Presented In The Cross-Petition

Although appearing to acknowledge that its claim does not meet this Court's criteria for granting review, California suggests that the cross-petition should be granted nonetheless because the questions presented in the petition and cross-petition are somehow intertwined. Cross-Pet. 2-4. California claims that the petition is based on an assumption that the filed rate doctrine bars the relief sought by California and that *Maislin* and *MCI* show that that assumption is erroneous. But California misunderstands the dispositive issue presented in the petition. The central error of the Ninth Circuit was not its disregard of the filed rate doctrine; rather, it was the court's conclusion that Congress granted FERC general authority to issue retroactive refunds under FPA § 205.

The difference between the two issues is plain. The filed rate doctrine, which applies "across the spectrum of regulated utilities," "has its origins in this Court's cases interpreting the Interstate Commerce Act." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).

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ing Before the S. Comm. on Energy and Natural Resources, 108th Cong. 37 (2003) (Sen. Cantwell, questioning whether Congress should "explicitly prohibit [power] marketers from charging market-based rates"), *available at* http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.120&filename=85674.pdf&directory=/diskb/wais/data/108_senate_hearings.

Under that Act, the filed rate doctrine did not prohibit the ICC from awarding "reparation[s]" when it found that a filed rate was unjust and unreasonable. *Maislin*, 497 U.S. at 129; *see id.* at 128 ("The filed rate doctrine . . . contains an important caveat: The filed rate is not enforceable if the ICC finds the rate to be unreasonable."). In the FPA, by contrast, "Congress withheld from [FERC] power to grant reparations." *Montana-Dakota Utils.*, 341 U.S. at 254.[17] It did so because "[w]holesale consumers of electric energy were apparently considered, as a rule, adequately protected by the provisions of the Act authorizing the Commission to grant prospective relief and, in certain circumstances, to order refunding of sums accumulated during the pendency of rate proceedings." *Id.* at 258 (Frankfurter, J., dissenting) (citing 16 U.S.C. §§ 824d(e), 824e(a)).

Deciding the cross-petition's broad challenge to the legitimacy of FERC's market-based rate regime is unnecessary to the resolution of whether the Ninth Circuit violated the FPA's clear limits on FERC's refund authority. To be sure, the Ninth Circuit's holding that FERC has authority to order refunds under § 205 in the circumstances of this case undoubtedly conflicts with decisions that have employed the concept of the filed rate doctrine in explaining FERC's lack of retroactive-refund power. *See* No. 06-888 Pet. 22-23. But the key fact is that Congress intentionally withheld from FERC the power that the Ninth Circuit has now given it. And that is true regardless of whether market-based rate tariffs satisfy FPA § 205(c). Accordingly, because the question presented in the cross-petition is neither independently worthy of certiorari nor integral to the proper resolution of the question presented in the petition, the cross-petition should be denied.

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[17] *Accord FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 24 (1968) ("[T]his Court has repeatedly held that [FERC] has no reparation power."); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944) (FERC "has no power to make reparation orders"); *see* No. 06-888 Pet. 19-21 (explaining the statutory history of FERC's limited power to order refunds for sales of wholesale electricity at unjust-and-unreasonable rates).

D. Prohibiting The Commission From Approving Market-Based Rate Tariffs Would Hurt The National Economy

Invalidating the Commission's market-based rate regime would cause a wide range of harms; here, we focus on one – undermining short-term markets for wholesale electricity. Those markets cannot function without market-based rate tariffs. In organized short-term markets based on a central clearing-price mechanism, all sellers receive the same price for their power, and that price may exceed some sellers' costs, while failing to meet the costs of other sellers.[18] Under the former regime of fixed, cost-based rates, such a market would not have been possible because sellers were prohibited from receiving more or less than the numerical, cost-based rates specified in their tariffs. *See generally* Energy Information Administration, U.S. Dep't of Energy, *The Changing Structure of the Electric Power Industry 2000: An Update* 63 (Oct. 2000) ("Without blanket approval to sell power at market-based rates, these competitive centralized markets could not exist."), *available at* http://www.eia.doe.gov/cneaf/electricity/chg_stru_update/update2000.pdf. In addition, individually negotiated short-term transactions that take place outside of organized markets would be impractical if (as California contends) parties were required to file the terms of those transactions with FERC for review before the contracts could be performed. That is because the Commission lacks the resources to review transactions quickly enough to enable the volume of trades necessary to sustain a competitive and liquid market.

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[18] *See, e.g.*, *Competition Report* at 69 & n.189 ("all U.S. exchange markets have a uniform price auction to determine the price of electric power"; "under a 'single price' or uniform price market, all sellers are paid the single market-clearing price"). The so-called "market clearing price," which all sellers receive, is the price for the most expensive unit of supply that is required to meet the demand at that particular time (bids to sell at a higher price are rejected). That pricing method encourages investment in new generation when efficiently produced (and therefore less expensive) energy is scarce. *See id.* at 79-80.

Restricting short-term markets would have adverse consequences on the electric energy industry and consumers of electricity. In particular, because organized spot markets "provide participants with guaranteed physical access to the transmission system," they can "increase competitive options for wholesale customers and suppliers as compared to most bilateral markets." *Competition Report* at 3-4. Further, the "price transparency" in organized markets can "increase the efficiency of the trading process for sellers and buyers and can give clear price signals indicating the best place and time to build new generation." *Id.* at 4. Groups as diverse as the Natural Resources Defense Council, California Wind Energy Association, and Citizens Action Coalition of Indiana have explained to the Commission that they "are convinced that properly structured regional wholesale electricity markets . . . can provide net benefits to customers and promote critical national goals related to fuel diversity, energy security, and environmental protection." Letter from Robert Gramlich, American Wind Energy Association, on behalf of numerous groups to Hon. Joseph T. Kelliher, Chairman, FERC, at 1 (Feb. 26, 2007), *available at* http://www.paenergynews.com/pdfs/letter_kelliher022807.pdf.[19]

Accepting California's challenge to the Commission's market-based rate regime would destroy those economic efficiencies and defeat Congress's policy of promoting competition in wholesale power markets. *See* Brief of Electric Power Supply Ass'n *et al.* at 5-6, No. 06-888 (filed Apr. 25, 2007) ("EPSA Br.") (discussing national policy of competition in wholesale power markets). Ultimately,

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[19] *See* Gordon van Welie, President and Chief Executive Officer of ISO New England Inc., Address to the Federal Energy Regulatory Commission's Conference on Competition in Wholesale Power Markets at 2, Docket No. AD07-7-000 (Feb. 27, 2007) ("Studies evaluating the result of competition fostered by organized electricity markets demonstrate substantial efficiency gains at the wholesale level and considerable progress with respect to investment in needed infrastructure."), *available at* http://www.iso-ne.com/pubs/pubcomm/pres_spchs/2007/ceo_remarks_ferc_conference_022707.pdf.

that loss of competition would harm the Nation's electricity consumers. As a number of noted economists have explained, "[a]mong economists, it is almost universally accepted that well functioning competitive electricity markets yield the greatest benefits to consumers in terms of price, investment and innovation," and "there is growing evidence and convincing studies that show that consumers have saved billions of dollars in energy costs as a result of competitive markets when compared to the traditional regulation in effect before competition was implemented." Open Letter to Policymakers from Paul L. Joskow *et al.* at 1, 2 (June 26, 2006), *available at* http://www.competecoalition.com/economists_letter.pdf; *see also* EPSA Br. 9-10 (discussing gains in consumer welfare produced by competitive wholesale electricity markets).

CONCLUSION

The Court should deny the conditional cross-petition for a writ of certiorari.

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Nos. 06-888 and 06-1100

In the Supreme Court of the United States

CORAL POWER, L.L.C., ET AL., PETITIONERS

v.

STATE OF CALIFORNIA EX REL. EDMUND G. BROWN, JR., ATTORNEY GENERAL OF CALIFORNIA, ET AL.

STATE OF CALIFORNIA EX REL. EDMUND G. BROWN, JR., ATTORNEY GENERAL OF CALIFORNIA, PETITIONER

v.

CORAL POWER L.L.C., ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission has statutory authority to assess refunds of payments made under market-based rate tariffs for electricity, where the sellers have failed to comply with the reporting requirements associated with market-based rate tariffs.

2. Whether the Federal Energy Regulatory Commission's market-based rate program is consistent with the Federal Power Act, 16 U.S.C. 791a *et seq.*

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In the Supreme Court of the United States

No. 06-888

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BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 383 F.3d 1006.[1] The orders of the Fed-

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix filed in No. 06-888.

eral Energy Regulatory Commission (Pet. App. 20a-60a, 61a-79a) are reported at 99 F.E.R.C. ¶ 61,247, and 100 F.E.R.C. ¶ 61,295.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2004. A petition for rehearing was denied on July 31, 2006 (Pet. App. 80a-81a). On October 23, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 28, 2006, and the petition in No. 06-888 was filed on that date. The petition was placed on the docket on January 4, 2007, and a conditional cross-petition for a writ of certiorari in No. 06-1100 was filed on February 5, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, grants the Federal Energy Regulatory Commission (Commission or FERC) jurisdiction over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1).

Proposed rates for the sale or transmission of power within FERC's jurisdiction are subject to FERC review to ensure that they are "just and reasonable" and not unduly discriminatory or preferential. 16 U.S.C. 824d(a) and (b). To this end, the FPA provides that, "[u]nder such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, * * * schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission." 16 U.S.C. 824d(c).

FERC may suspend a proposed rate for up to five months pending an investigation of its lawfulness. See 16 U.S.C. 824d(e) If no decision is reached by the end of the suspension period, the proposed rate will go into effect, but it may be placed into effect subject to refund. See *ibid.*

If, after a hearing—either on its own motion or based on a complaint—FERC determines that any existing rate or charge is unjust or unreasonable, it must determine and fix by order the just and reasonable rate or charge "to be thereafter observed and in force." 16 U.S.C. 824e(a). FERC also may "order the [seller] to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate." 16 U.S.C. 824e(b). At the time of the proceeding at issue here, the "refund effective date" could be no earlier than 60 days after a complaint was filed or 60 days after publication of the Commission's intent to initiate a proceeding on its own motion. *Ibid.*[2]

FERC also has the general authority "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter." 16 U.S.C. 825h. Invoking that power, the Commission may determine remedies for violations of tariffs, including the award of disgorgement (*i.e.*, re-

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[2] The Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, amended the FPA to give FERC an additional 60 days of refund authority. The "refund effective date" is now the date on which the complaint was filed or on which the Commission announced its intent to initiate a proceeding on its own motion. See *id.* § 1285, 119 Stat. 980 (to be codified at 16 U.S.C. 824e(b) (Supp. V 2005)).

funds) of unjust profits. See *Consolidated Edison Co. of N.Y., Inc.* v. *FERC*, 347 F.3d 964, 967 (D.C. Cir. 2003); *Town of Concord* v. *FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992).

2. Until the 1980s, the Commission established rates primarily on a cost-of-service basis. As barriers to entry in the generation sector declined, however, a competitive market for wholesale sales of electricity began to develop. In response to those developments, the Commission began considering and approving market-based rates for wholesale electricity sales in the late 1980s.

Under the Commission's market-based rate program, the Commission approves a seller's request to sell electricity at market-based rates only if it first finds that the seller and its affiliates either do not have market power or have adequately mitigated their market power. Pet. App. 9a-10a. Market power is defined as a seller's ability to "significantly influence price in the market by withholding service and excluding competitors for a significant period of time." *Id.* at 10a n.4 (quoting *Citizens Power & Light Corp.*, 48 F.E.R.C. ¶ 61,210, at 61,777 (1989)). The Commission's approach is designed to assure just and reasonable rates because in "a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable." *Id.* at 10a (quoting *Tejas Power Corp.* v. *FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990)).

In order to ensure that the Commission can monitor, on a continuing basis, that market-based rates remain just and reasonable and that the markets are not subject to manipulation, the Commission also imposes ongoing quarterly reporting requirements for market transactions. Pet. App. 10a-11a. The quarterly reporting re-

quirement provides a means for the Commission and the public to spot pricing trends or discriminatory patterns that might suggest the exercise of market power. *Id.* at 42a. For each purchase and sale contract, marketers are required to report the buyer's or seller's name, a description of the service, the delivery point for the service, the price, the quantities to be served or purchased, the contract's duration, and any other attributes of the product being purchased or sold that contribute to its market value. *Id.* at 49a.

After-the-fact reporting allows the market to operate initially without regulatory intrusion, avoiding the costs that would be associated with prospective review of a large number of transactions, many of which are of short duration. Pet. App. 46a. At the same time, the reporting requirement provides the Commission with information with which it can monitor and oversee the rates being charged, and it places sellers on notice that their transactions will be subject to review and, if necessary, to remedial action, including the possible revocation of their market-based rate authorization. *Ibid.* Further, upon finding a tariff violation, the Commission may take retroactive action, including ordering the disgorgement of unjust profits. *Id.* at 76a.

3. In 1995, in response to retail electricity rates that were well above the national average, California comprehensively restructured its electric energy industry. At that time, the major traditional investor-owned utilities were vertically integrated; that is, they owned generating resources, transmission lines, and distribution facilities. Pet. App. 2a & n.2. Under the restructuring, those utilities were required to divest most of their generating assets and to purchase power at market-based rates through an independent power exchange, which

organized the wholesale market, and an independent system operator, which managed the transmission network. Most (but not all) wholesale sellers participating in the organized markets were public utilities that were required to obtain market-based rate authorization from the Commission, and all sellers participating in the organized markets were subject to FERC-approved market rules governing the power exchange and the transmission-system operator. See generally *Public Util. Dist. No. 1* v. *Dynegy Power Mktg., Inc.*, 384 F.3d 756, 758-759 (9th Cir. 2004), cert. denied, 545 U.S. 1149 (2005); see also *California ex rel. Lockyer* v. *Dynegy, Inc.*, 375 F.3d 831, 835-836 (9th Cir. 2004), cert. denied, 544 U.S. 974 (2005).

As part of California's restructuring plan, in 1996, California's three major investor-owned utilities filed applications with FERC seeking authority to sell electric energy at wholesale at market-based rates. In accordance with its established policy, FERC approved their requests for market-based rate authority after finding that the companies and their affiliates either did not have, or had adequately mitigated, market power. See, *e.g.*, *Pacific Gas & Elec. Co.*, 81 F.E.R.C. ¶ 61,122, at 61,437, 61,537, 61,572 (1997). FERC also reviewed and approved applications by other wholesale generators and suppliers that lacked, or had adequately mitigated, market power to sell electric energy at market-based rates in the California markets.

For several years, the restructured California electricity markets operated largely as intended. Starting in the summer of 2000, however, wholesale electricity prices in California increased significantly; utilities incurred billions of dollars in debt; and the independent system operator declared dozens of system emergencies

and occasional rolling blackouts. See generally *In re California Power Exch. Corp.*, 245 F.3d 1110, 1115 (9th Cir. 2001).

Acting in response to a complaint filed on August 2, 2000, FERC took steps to remedy that situation. Specifically, it implemented structural and pricing reforms to make California and Western electricity markets more stable and less susceptible to price spikes. See, *e.g.*, *California Power Exch. Corp.*, 245 F.3d at 1114-1116; *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 93 F.E.R.C. ¶ 61,294, at 61,983 (2000). As a result of these measures and other factors, by early June 2001, prices in California spot and forward markets fell back to preexisting competitive levels. See *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Serv.*, 95 F.E.R.C. ¶ 61,418, at 62,546 (2001).

FERC also established a proceeding (the Refund Proceeding) to determine refunds owed by suppliers in the California spot markets for sales at unjust and unreasonable rates. See generally *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Serv.*, 96 F.E.R.C. ¶ 61,120 (2001) (*San Diego*). See also *Public Utils. Comm'n* v. *FERC*, 462 F.3d 1027 (9th Cir. 2006); *Bonneville Power Admin.* v. *FERC*, 422 F.3d 908 (9th Cir. 2005). At the time, the statute established the earliest refund date as 60 days following the filing of a complaint with FERC, so the Commission began the refund period as of October 2, 2000. See 16 U.S.C. 824e(b); see also note 2, *supra*. FERC has the authority to direct additional remedies—including the disgorgement of profits—for tariff violations occurring during any time period. But at the time the Refund Proceeding was established, the Commission found that no violation of sellers' market-based rate tariffs had yet been demon-

strated. See, *e.g.*, *San Diego*, 96 F.E.R.C. at 61,507-61,508; see also FERC: *Report to Congress, The Commission's Response to the California Electricity Crisis and Timeline for Distributions of Refunds* at 9-11, 20-26 (2005) <http://www.ferc.gov/legal/staff-reports/comm-response. pdf> (*Report to Congress*) (discussing conduct of Refund Proceeding and providing estimated timeline for completion of distribution of refunds); *Public Utils. Comm'n* v. *FERC*, No. 01-71934 (9th Cir.) (appeals of FERC orders computing specific refunds).

In early 2002, after uncovering evidence that one market participant, Enron, had abused its market-based pricing authority, FERC initiated a separate, broad-based investigation into whether any entity manipulated short-term prices in Western energy markets during the period beginning January 1, 2000. See *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 F.E.R.C. ¶ 61,165 (2002). FERC staff obtained data from all segments of the industry and identified instances of alleged market-power abuses and tariff violations. Based on the staff's findings, the Commission initiated several formal proceedings to examine instances of potential wrongdoing and to take appropriate remedial action, regardless of when the wrongdoing occurred. See, *e.g.*, *American Elec. Power Serv. Corp.*, 103 F.E.R.C. ¶ 61,345 (2003) (initiation of show-cause proceedings on possible gaming and anomalous market behavior), reh'g denied, 106 F.E.R.C. ¶ 61,020 (2004), appeals pending *sub nom. Pacific Gas & Elec. Co.* v. *FERC*, No. 05-71008 (9th Cir. filed Feb. 25, 2005) (in abeyance).

FERC subsequently has approved or facilitated numerous settlements providing for over $6 billion in refunds for alleged market manipulation or excessive

rates in the West during 2000 and 2001. See *Report to Congress* 13-20. Efforts are still underway to negotiate settlements of the remaining disputes. See *Public Utils. Comm'n* v. *FERC*, No. 01-71051 (9th Cir. Feb. 16, 2007) (order noting that "settlement efforts are continuing" and directing court mediator to "continue overseeing and exploring with the parties possible resolution through mediation").

4. In the proceeding below, the State of California filed a complaint with FERC alleging that the Commission's market-based rate filing requirements violate the FPA. Pet App. 20a-79a. California also alleged that even if the Commission's market-based rate requirements are valid, the quarterly reports actually filed by generators and marketers selling into certain California markets during the 2000-2001 energy crisis did not contain required transaction-specific information. *Ibid.*

The Commission granted the complaint in part, finding that those quarterly filings that reported aggregated, rather than transaction-specific, data did not comply with 16 U.S.C. 824d(c), or with the Commission's after-the-fact reporting requirements. In particular, the Commission determined that energy suppliers Williams, Dynegy, Mirant, and Reliant, and perhaps other suppliers, failed to comply with the Commission's reporting requirements for the fourth quarter of 2000 and all four quarters of 2001. Pet. App. 50a-51a. To cure the non-compliance, the Commission directed marketers and other public utility sellers to re-file past reports and to file all future reports to show non-aggregated data. *Id.* at 51a.

The Commission denied California's request for refunds, finding that the failure to report transactions in the proper format was "essentially a compliance issue,"

and that "the sellers' re-filing of quarterly reports to include transaction-specific data is an appropriate and sufficient remedy." Pet. App. 53a-54a. FERC also noted that 16 U.S.C. 824e permits it to institute a refund proceeding only for the refund effective period, commencing after the filing of a complaint or the initiation of a refund proceeding on the Commission's own motion. Pet. App. 52a. Thus, the Commission found that it was precluded from ordering refunds for transactions prior to the date California filed its complaint—that is, March 16, 2002. *Ibid.* California argued that retroactive refunds were permissible because the reporting deficiencies meant, in effect, that no rates were lawfully on file. The Commission rejected that theory, concluding that the tariffs authorizing market-based rates—and not the quarterly reports required by FERC's rules—constituted the filed rate. *Id.* at 53a.

5. The court of appeals granted California's petition for review in part, denied it in part, and remanded the case to FERC for further proceedings. Pet. App. 1a-19a.

The court held that the Commission's market-based rate program generally satisfied the notice and filing requirements of 16 U.S.C. 824d, because it included "the dual requirement of an ex ante finding of the absence of market power *and* sufficient post-approval reporting requirements." Pet App. 11a. In so holding, the court distinguished the Commission's market-based rate program from market-based rate programs previously administered by the Federal Communications Commission and the Interstate Commerce Commission, which were set aside by this Court. *Id.* at 10a (citing *MCI Telecomms. Corp.* v. *AT&T Co.*, 512 U.S. 218 (1994), and *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497

U.S. 116 (1990)). The court explained that those programs "relied on market forces alone," whereas the Commission conducted both before-the-fact and after-the-fact review of market conditions "to ensure that the rate is 'just and reasonable' and that markets are not subject to manipulation." Pet. App. 10a-11a.

As to the years and markets in question, however, the court observed that "non-compliance with FERC's reporting requirements was rampant" and the Commission consequently lacked the information necessary for effective after-the-fact monitoring. Pet. App. 12a. Accordingly, the Commission's "ability to monitor the market, or gauge the 'just and reasonable' nature of the rates [was] eliminated," *id.* at 15a, at a time when "the California energy market was subjected to artificial manipulation on a massive scale." *Id.* at 13a.

The court rejected the Commission's position that it lacked authority, under those circumstances, to order refunds retroactively based on reporting failures. Pet. App. 14a. Instead, it held that "FERC possesses broad remedial authority to address anti-competitive behavior." *Ibid.* As "the reporting requirements were an integral part of a market-based tariff," *id.* at 15a, the court determined that FERC possessed the authority to order retroactive refunds to address violations of the tariff. "The power to order retroactive refunds when a company's non-compliance has been so egregious that it eviscerates the tariff is inherent in FERC's authority to approve a market-based tariff in the first instance." *Ibid.*

The court declined to order refunds itself, noting that "[i]t is more appropriate for FERC to reconsider its remedial options in the first instance." Pet. App. 18a. It emphasized that the Commission, on remand, "may elect

not to exercise its remedial discretion by requiring refunds." *Id.* at 15a.

ARGUMENT

Petitioners contend (Pet. 16-30) that the court of appeals expanded FERC's remedial authority under 16 U.S.C. 824d. Petitioners are incorrect. In fact, the court simply applied the Commission's well-established statutory authority to order appropriate relief, including refunds, when a seller has violated the terms of a tariff. The court's antecedent determination—that a tariff violation occurred in this case—does not conflict with any decision of this Court or any other court of appeals. Nor does the case have the practical significance that petitioners suggest (Pet. 26-30). The court of appeals did not order any particular remedy, but simply remanded to allow FERC to exercise its discretion. The interlocutory posture of the case makes this Court's review inappropriate at this time.

1. Petitioners' arguments rest on the erroneous premise that the court of appeals expanded FERC's statutory authority in holding "that [16 U.S.C. 824d] authorizes FERC to order retroactive refunds" for periods before the refund effective date specified in the FPA. Pet. 16. Contrary to petitioners' assertions, the court of appeals did not contravene the FPA in interpreting the Commission's remedial authority. Indeed, the principal issue before the court of appeals was not the interpretation of the FPA—it is well-established that FERC has statutory authority to order retroactive remedies for tariff and filed-rate violations. The issue before the court of appeals was simply whether such violations occurred during the California energy crisis.

FERC's authority to remedy tariff and filed-rate violations derives from its general "power to perform any and all acts * * * it may find necessary or appropriate to carry out" the FPA. 16 U.S.C. 825h. As the D.C. Circuit has recognized, that provision gives the Commission "discretion to determine the remedy for tariff violations," and those remedies "may include refunds." *Consolidated Edison Co. of N.Y., Inc.* v. *FERC*, 347 F.3d 964, 972 (2003). Indeed, FERC "has a 'general policy of granting full refunds' for overcharges." *Ibid.* (quoting *Town of Concord* v. *FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992)); see *Boston Edison Co.* v. *FERC*, 856 F.2d 361, 369 (1st Cir. 1988) (under Section 825h, FERC "can enforce the terms of a filed rate and order refunds for past violations of one"); *Southern Cal. Edison Co.* v. *FERC*, 805 F.2d 1068, 1070-1072 (D.C. Cir. 1986).[3]

In the Refund Proceeding in 2001, the Commission rejected demands for refunds predating the complaint in that case. FERC recognized that it had authority to "take retroactive action" to remedy tariff violations, but it concluded that "it has not been demonstrated that any conditions or limitations of sellers' market-based rate tariffs have been violated." *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Serv.*, 96 F.E.R.C. ¶ 61,120, at 61,507-61,508 (2001). The Commission's orders in this case adopted that analysis in rejecting California's demands for refunds predating its complaint. Pet. App. 52a-54a & n.55 (citing *San Diego*, 96 F.E.R.C.

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[3] Petitioners acknowledge (Pet. 19 n.33) that FERC has authority under Section 825h "to punish a seller's violation of its own tariff," but they object that "no such violations have been proved here." Petitioners did, however, violate the Commission's reporting requirements, and the court of appeals in turn determined that those requirements "were an integral part" of the tariff. Pet. App. 15a.

at 61,[illegible]; Pet. App. 76a & n.25 (citing *San Diego*, 96 F.E.R.C. at 61,507-61,508). The Commission concluded that the reporting violations were essentially "compliance issue[s]" and were not tariff violations (which would implicate the Commission's retroactive remedial authority). Pet. App. 53a, 74a. The Commission distinguished *Washington Water Power Co.*, 83 F.E.R.C. ¶ 61,282 (1998), and *Delmarva Power & Light Co.*, 24 F.E.R.C. ¶ 61,199, opinion modified by 24 F.E.R.C. ¶ 61,380 (1983)—cases in which it had ordered disgorgement of profits—on the ground that those cases involved tariff violations that permitted the Commission to award retroactive refunds. Pet. App. 77a.

The court of appeals disagreed, finding that the post-approval reporting requirement is a critical aspect of the market-based rate tariff itself. Pet. App. 12a-13a; see *id.* at 14a (noting "the integral nature of the reporting requirements to an effective market-based tariff"). Observing that the reporting requirement was subject to "rampant" non-compliance during the California energy crisis, *id.* at 12a, the court of appeals concluded that the Commission in fact possessed remedial authority, like that exercised in *Washington Water Power* and *Delmarva*, to remedy the tariff violations that the court held had occurred. *Id.* at 14a-15a.

Thus, contrary to petitioners' suggestion (Pet. 16-23), the court of appeals did not expand FERC's refund authority under 16 U.S.C. 824d and 824e. Rather, the key difference between the court of appeals' opinion and the Commission's decision below is that the Commission, unlike the court of appeals, did not equate a violation of its after-the-fact reporting requirement to a violation of the tariff. Only in this respect did the court of appeals find the Commission to have broader authority than the

Commission believed it possessed in the circumstances of the present case. The court of appeals determined that the reporting violation was effectively a violation of the market-based tariff, implicating FERC's authority to remediate a tariff violation whenever it occurred, such as that exercised in *Washington Water Power* and *Delmarva*. Pet. App. 14a-15a; see *Public Utils. Comm'n* v. *FERC*, 462 F.3d 1027, 1048-1049 (9th Cir. 2006) (noting that FERC has recognized, in initiating investigative and enforcement proceedings concerning Enron and other energy suppliers, that it possesses full remedial authority to address tariff violations). That antecedent issue, concerning the elements of the tariffs under which petitioners sold electric power during the relevant period, does not warrant review by this Court.

2. Because the court of appeals did not expand FERC's statutory refund authority, the conflict suggested by petitioners is illusory. Petitioners invoke (Pet. 22-23) this Court's decisions applying the filed-rate doctrine. Those cases hold that the Commission may not order retroactive refunds of payments made under a tariff that has been properly filed. See, *e.g.*, *FPC* v. *Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956). The decision of the court of appeals is consistent with that principle. As explained above, the court simply determined that the sellers had violated the terms of their tariffs. It is undisputed that the Commission has authority to provide redress in that situation.

For the same reason, petitioners err when they suggest (Pet. 24-26) that the decision below conflicts with decisions of other courts of appeals. In particular, the decision of the court of appeals does not "diverge[] from the prevailing rule in the D.C. Circuit." Pet. 25. To the contrary, the D.C. Circuit has recognized—in the very

case on which petitioners principally rely—that FERC may, and generally does, grant full refunds for violations of a tariff. See *Consolidated Edison*, 347 F.3d at 972-973. To the extent that the cases cited by petitioners identified statutory limits on FERC's refund authority, they did not address the situation in which a seller has violated a tariff. See, *e.g.*, *Distrigas of Mass. Corp.* v. *FERC*, 737 F.2d 1208, 1221 (1st Cir. 1984) (Breyer, J.) (discussing "payments made under a rate that was lawful at the time of payment"). And petitioners have identified no decision that conflicts with the court of appeals' determination that the sellers in this case, by violating FERC's reporting requirements, effectively violated their market-based tariffs.

3. Petitioners are similarly mistaken in asserting (Pet. 26) that the decision of the court of appeals is "of enormous practical importance." The court of appeals agreed with California only to the extent that it concluded that "FERC improperly concluded that retroactive refunds were not legally available." Pet. App. 18a. It did not require the Commission to order refunds; instead, it remanded to allow the agency to exercise its discretion. *Ibid.* Indeed, the court explicitly stated that the Commission "may elect *not* to exercise its remedial discretion by requiring refunds." Pet. App. 15a (emphasis added).[4]

Petitioners argue (Pet. 27-28) that retroactive refunds will threaten the growth and competitiveness of

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[4] Petitioners assert that the court of appeals has extended the decision below in a subsequent decision regarding FERC's review of long-term contracts for the sale of electricity. Pet. 29 (citing *Public Util. Dist. No. 1* v. *FERC*, 471 F.3d 1053 (9th Cir. 2006)). But in that case, too, the court merely remanded "to allow FERC the opportunity to review these complaints in the first instance." *Id.* at 1057.

wholesale power markets, chill future investment, and destabilize wholesale electricity markets. Petitioners may present those arguments on remand, and the Commission may take them into account in exercising its remedial discretion. If petitioners are dissatisfied with the Commission's exercise of its discretion, or if they believe that it has exceeded its statutory authority on remand, they will be able to seek judicial review. See 16 U.S.C. 825*l*(b). At present, however, the interlocutory nature of the refund issue makes any review by this Court premature. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).[5]

4. Although opposing the petition for a writ of certiorari, the State of California has filed a conditional cross-petition for a writ of certiorari (No. 06-1100). The cross-petition seeks review of the court of appeals' holding that the Commission's market-based rate program produced valid filed rates in compliance with the prior notice and filing requirements of the FPA. Cross-Pet. 2-12. As California appears to recognize, that issue does not independently warrant this Court's review. The resolution of the issue by the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, even if this Court

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[5] The practical significance of this case is further limited by the improbability that a situation of the seriousness and magnitude of the California energy crisis will recur. See *Report to Congress* 8 (describing the unusual combination of factors that led to the California energy crisis); *Californians for Renewable Energy, Inc.* v. *California Pub. Utils. Comm'n*, 119 F.E.R.C. ¶ 61,058, 2007 WL 1155627, at * 7 para. 30 (Apr. 19, 2007) (noting that "the 2000-2001 energy crisis in the West" was "an unprecedented situation in which numerous adverse events occurred simultaneously"); see also pp. 23-25, *infra*.

were to grant the principal petition, the conditional cross-petition should be denied.

a. FERC's approval of market-based rates fully complied with the FPA. While 16 U.S.C. 824d(a) requires that "[a]ll rates and charges made * * * shall be just and reasonable," the FPA does not dictate, or even mention, any particular ratemaking methodology to be followed. Thus, the statute grants FERC broad discretion as to how the statute's ratemaking mandate will be satisfied. The market-based rate program represents a reasonable exercise of that discretion.

Contrary to California's contention (Cross-Pet. 5), the market-based rate program does not violate the FPA's filing requirement. The FPA requires that every public utility file with FERC "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission," 16 U.S.C. 824d(c), but it explicitly leaves the timing and form of those filings to FERC's discretion. Public utilities must file "schedules showing all rates and charges" under "such rules and regulations as the Commission may prescribe," and "within such time and in such form as the Commission may designate." *Ibid.*[6] Accordingly, as the court of appeals explained, "so long as FERC has approved a tariff within the scope of its FPA authority, it has broad discretion to establish effective reporting requirements for administration of the tariff." Pet. App. 11a.

Nor does the market-based rate program result in utilities filing "no rates at all." Cross-Pet. 10. For the tariff applicable here, the Commission requires sellers

[6] The FPA does not define "schedules," leaving that to FERC's discretion as well. FERC has defined "rate schedule" in its regulations at 18 C.F.R. 35.2(b).

to file quarterly reports detailing, for each individual purchase and sale, the names of the parties, a description of the service, the delivery point of the service, the price charged and quantity provided, the contract duration, and any other attribute of the product being purchased or sold that contributed to its market value. Pet. App. 11a, 49a. That reporting requirement provides a means for the Commission and the public to spot pricing trends or discriminatory patterns that might indicate the exercise of market power. *Id.* at 42a.

California asserts (Cross-Pet. 11-12) that the market-based rate program contravenes 16 U.S.C. 824d(d), which requires that all rates be filed 60 days before service begins, and 16 U.S.C. 824d(e), which permits suspension and investigation of proposed rates before they are charged. But as the court of appeals recognized, "FERC's system consists of a finding that the applicant lacks market power (or has taken sufficient steps to mitigate market power), coupled with a strict reporting requirement to ensure that the rate is 'just and reasonable' and that markets are not subject to manipulation." Pet App. 10a-11a. Under the market-based rate regime, the rate change is initiated when an applicant applies for authorization of market-based pricing. At that time, there is an opportunity for a hearing, with the burden of proof on the applicant to show that it lacks, or has adequately mitigated, market power. See generally 18 C.F.R. Pt. 35 (filing requirements and procedures). That investigation fully satisfies 16 U.S.C. 824d(d) and (e). In addition, if an applicant is granted market-based rate authority, then it must file quarterly reports showing transaction-specific data for all transactions. See 18 C.F.R. 35.10b. California asserts (Cross-Pet. 12) that the procedures established by Congress for reviewing

the legality of proposed rates "cannot function properly without advance filing." In contrast to California's view that the after-the-fact reports are per se invalid or insufficient, the court of appeals explained that the reporting requirements are "integral to the [market-based rate] tariff" and that they, together with the Commission's initial approval of market-based rate authority, comply with the FPA's requirements. Pet. App. 16a.

b. California suggests that the decision of the court of appeals is inconsistent with cases holding that the FPA requires that a rate filing specify the "rate itself," and not simply provide that rates will be determined by agreement. Cross-Pet. 5 (citing *Electrical Dist. No. 1* v. *FERC*, 774 F.2d 490, 492-493 (D.C. Cir. 1985) (Scalia, J.)). *Electrical District* resolved a "disagreement over what it means to 'fix' a rate within the meaning of 16 U.S.C. 824e(a)"—not Section 824d(c). 774 F.2d at 492. The D.C. Circuit rejected FERC's "policy of making rates effective as of the date of an order [under 16 U.S.C. 824e] setting forth no more than the basic principles pursuant to which the new rates are to be calculated." *Id.* at 493. *Electrical District* holds only that FERC cannot, in a proceeding under Section 824e, "announce some formula and *later* reveal that the formula was to govern from the date of announcement." *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570, 578 (D.C. Cir. 1990). It says nothing about whether FERC can establish rules under Section 824d(c) that permit the filing and approval of market-based rate tariffs.

The other court of appeals cases cited by California are equally inapposite. In *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376, 379-380 (D.C. Cir. 1986) (Scalia, J.), the Interstate Commerce Commission approved a tariff provision under which freight

forwarders could provide services to shippers at unpublished rates determined by averaging prior charges to those shippers. *Id.* at 377-378. The court found that that provision violated 49 U.S.C. 10761(a) (1982), which required that rates be "contained in a tariff," because the agreed-upon average rates would never be published nor filed with the Commission. 793 F.2d at 380. The court noted that Section 10761(a) expressly prohibited the charging of any rate different from the tariffed rate. See *id.* at 379. Here, in contrast, 16 U.S.C. 824d(c) expressly permits sellers to set rates either by tariff or by contract, and the Commission's market-based rate program requires quarterly filings providing details of all transactions.

Similarly, in *Southwestern Bell Corp.* v. *FCC*, 43 F.3d 1515, 1521 (D.C. Cir. 1995), the FCC "adopt[ed] a policy of permitting nondominant common carriers to file a range of rates as opposed to fixed rates showing a schedule of charges." *Id.* at 1517. The court held that the FCC policy violated 47 U.S.C. 203(a), which requires that every common carrier file "schedules showing all charges." 43 F.3d at 1517. That statute requires a specific list of discernible rates, rather than a filing of a range of possible rates. *Id.* at 1521. Here, FERC's quarterly reports require each seller to list the terms of each transaction individually. See Pet. App. 13a (noting the "transaction-specific" nature of the required filings). The transaction-specific data required in FERC's quarterly reports do not constitute a range of rates similar to that rejected in *Southwestern.*

c. California also errs in arguing (Cross-Pet. 7-10) that the decision below is inconsistent with this Court's decisions in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), and *MCI Telecommuni-*

cations Corp. v. *AT&T Co.*, 512 U.S. 218 (1994). The Commission's interconnected program of ex ante findings of no market power, coupled with post-approval reporting requirements, distinguishes the market-based rate program from those at issue in *Maislin* and *MCI*.

Maislin involved an ICC policy that allowed carriers to charge privately negotiated contract rates that differed from the filed tariff rate, were never disclosed to or reviewed by the ICC, and were not subject to challenge for discrimination. 497 U.S. at 132-133. This Court found that the policy violated the filed-rate doctrine. *Id.* at 127. Here, in contrast, market-based sales are made in accordance with a market-based rate umbrella tariff, approved only after FERC determines, in a publicly-noticed proceeding with opportunity for interested parties to protest, that a seller lacks market power. Pet. App. 10a. In addition, FERC's system requires the quarterly filing of the actual rates charged for individual transactions, allowing both FERC and the public to review rates for reasonableness and lack of undue discrimination. *Id.* at 11a. After market-based rate authority is granted, parties can file complaints, or FERC can institute its own proceeding, to challenge market-based rates as unduly discriminatory or unjust or unreasonable, or to question whether the seller has market power.

California's reliance on *MCI* is similarly misplaced. *MCI* rejected an FCC policy that relieved *all* nondominant carriers of *any* requirement to file any of their rates with the agency. This Court found that such wholesale detariffing for nondominant carriers effectively removed all rate regulation where the FCC found competition to exist. 512 U.S. at 231-232. FERC's market-based rate system, by contrast, requires every

seller with market-based rate authority to have on file an umbrella market-rate tariff and to file quarterly reports detailing the specific rates charged for each sale. No detariffing occurs in these circumstances. As the *MCI* Court held, it would not violate the filed-rate doctrine for the FCC to "modify the form, contents, and location of required filings, and [to] defer filing or perhaps even waive it altogether in limited circumstances." *Id.* at 234. That is what FERC did here.

In fact, courts of appeals have recognized that market-based rates are consistent with the requirements of the FPA and cognate statutes. "[W]hen there is a competitive market the FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a 'just and reasonable' result." *Elizabethtown Gas Co.* v. *FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993); see *Tejas Power Corp.* v. *FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990); *Louisiana Energy & Power Auth.* v. *FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998); *Cajun Elec. Power Coop., Inc.* v. *FERC*, 28 F.3d 173, 176, 179, 180 (D.C. Cir. 1994). As the court of appeals correctly found, in "a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment." Pet. App. 10a (quoting *Tejas*, 908 F.2d at 1004). No court of appeals has held that FERC's approval of a market-based system such as that in California is inconsistent with the FPA's mandates.

d. Since the conduct at issue in the orders here, the Commission has taken additional steps to develop and improve its market monitoring and enforcement mecha-

nisms.[7] These and other actions to promote competitive, transparent, and robust energy markets address the sorts of concerns articulated in California's cross-petition. In addition, the Energy Policy Act of 2005 has given FERC new authority to remedy manipulative be-

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[7] See generally *Californians for Renewable Energy, Inc.*, 2007 WL 1155627, at *7 para. 31 (describing steps taken by the Commission "to ensure that there are appropriate market safeguards in place to prevent a repeat of the California 2000-2001 energy crisis"); see also, *e.g.*, *Revised Public Utility Filing Requirements*, 99 F.E.R.C. ¶ 61,107 (Order No. 2001) (requiring electronic filing of quarterly reports providing transaction-specific data on wholesale power sales) (67 Fed. Reg. 31,044 (2002)), decision clarified by 100 F.E.R.C. ¶ 61,074 (2002); *Order Amending Market-Based Rate Tariffs & Authorizations*, 105 F.E.R.C. ¶ 61,218 (2003) (imposing market behavioral rules in all market-based rate tariffs), decision clarified by 107 F.E.R.C. ¶ 61,175 (2004); *Electric Quarterly Reports*, 105 F.E.R.C. ¶ 61,219 (2003) (revoking market-based rate authority for utilities that failed to meet reporting requirements); *Order Revoking Market-Based Rate Authority, Establishing Hearing and Settlement Judge Procedures, and Terminating Section 206 Proceeding*, 113 F.E.R.C. ¶ 61,124 (2005) (same); *AEP Power Marketing, Inc.*, 107 F.E.R.C. ¶ 61,018 (2004) (adopting new interim generation market-power analysis and mitigation policy); *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, 110 F.E.R.C. ¶ 61,097 (2005) (Order No. 652) (amending regulations to establish a reporting obligation for changes in status that apply to public utilities authorized to make sales at market-based rates) (70 Fed. Reg. 8253 (2005)); *Prohibition of Energy Mkt. Manipulation*, 114 F.E.R.C. ¶ 61,047 (2006) (Order No. 670) (amending Commission regulations to implement new Section 222 of the Federal Power Act, prohibiting the employment of manipulative or deceptive devices or contrivances) (71 Fed. Reg. 4244 (2006)). See also *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity, and Ancillary Services by Public Utilities*, 115 F.E.R.C. ¶ 61,210 (2006) (notice of proposed rulemaking to revise current standards for market-based rate sales); *Notice of Proposed Rulemaking*, 118 F.E.R.C. ¶ 61,031 (2007) (proposing revised standards of conduct for electric transmission providers).

havior by participants in wholesale electricity markets. See Pub. L. No. 109-58, § 315, 119 Stat. 691 (to be codified at 16 U.S.C. 824v (Supp. V 2005)) (authorizing FERC to prohibit "any manipulative or deceptive device or contrivance" by "any entity" in connection with a FERC-jurisdictional transaction); *id.* § 1284, 119 Stat. 980 (to be codified at 16 U.S.C. 825*o* (Supp. V 2005)) (providing for enhanced civil penalties for willful violations of Part II of the FPA).

Those new statutory provisions and measures instituted by the Commission since the California energy crisis in 2000-2001 also reinforce the conclusion that the remedial issue raised in the principal petition, which arises out of the unique context of that crisis, does not warrant review by this Court, especially at this interlocutory stage of the proceedings.

CONCLUSION

The petition and conditional cross-petition for writs of certiorari should be denied.

Respectfully submitted.

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STATE OF CALIFORNIA EX REL.
EDMUND G. BROWN JR., ATTORNEY GENERAL,

Cross-Petitioner,

v.

CORAL POWER, L.L.C., et al.,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

The question presented by the cross-petition is whether Section 205 of the Federal Power Act ("FPA"), 16 U.S.C. § 824d (1994), permits utilities to charge unfiled rates subject only to *post hoc* challenges under FPA Section 206, 16 U.S.C. § 824e (1994). It does not.

In their oppositions, Coral Power L.L.C. et al. ("Sellers") and the Federal Energy Regulatory Commission ("FERC") try in various ways to skirt the issue, rather than address it directly. They insist that FERC has no obligation to "adhere rigidly to a cost-based determination of rates. . . ." Sellers Opposition ("Opp.") at 4 & n.3 (quoting *FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979)); FERC Opp. at 23. But that is a red herring. The issue is not whether the FPA requires cost-based rates, but whether rates are being *filed* as required by the statute. They argue that no "detariffing" has occurred because suppliers must file "market-based rate tariffs," Sellers Opp. at 11, despite the fact that "market-based rate tariffs" contain no rates whatsoever, just a statement that rates will be determined "by agreement." And they suggest that the Court should ignore the failure to file rates in tariffs on the grounds that FERC still "exercises substantial regulatory oversight." *Id.* But again, the issue is not whether FERC is doing an adequate job of market monitoring, but whether it is enforcing the FPA as written. Both FERC and the Sellers fail to come to grips with the text of the FPA or the numerous Supreme Court and circuit court decisions cited in the cross-petition which conflict squarely with the notion that a "market-based rate tariff" produces filed rates.

Although the California Attorney General continues to maintain that review should be denied in No. 06-888, if the Court decides otherwise, the cross-petition should also be granted because: 1) the question presented must be

resolved in order to properly consider the main petition; and 2) it independently warrants certiorari.[1]

A. The Question Presented By The Cross-Petition Must Be Resolved In Order To Properly Consider The Question Presented By The Main Petition.

The Sellers argue that the issue of whether market-based rate tariffs produce "filed rates" need not be resolved because the "central error of the Ninth Circuit was not its disregard of the filed rate doctrine," but that it granted FERC the power to award "reparations." Sellers Opp. at pp. 18-19. This is pure misdirection. The California Attorney General's complaint at FERC did not seek "reparations," and the Ninth Circuit did not grant FERC authority to award "reparations."

Rather, the complaint sought refunds as a remedy for widespread violations of the statutory rate filing requirement. *See* Complaint of State of California ex rel. Bill Lockyer, Attorney General, FERC Docket No. EL02-71, filed March 19, 2002, at 1-2 ("to the extent that any *non-filed* rates are found to exceed just and reasonable levels, the California Attorney General seeks refunds") (emphasis added). The Ninth Circuit – consistent with a long line of circuit court decisions – held that FERC has ample authority to award retroactive refunds in the face of such violations. *See* California Attorney General's Brief in Opposition, No. 06-888, filed Feb. 5, 2007, at 9-19.

In any event, the very authority on which the Sellers rely states that "Congress did not intend either court or Commission to have the power to award reparations on the ground that a *properly filed* rate or charge has in fact been unreasonably high or low." *Montana-Dakota Utils.*

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[1] Contrary to the Sellers' claim, Sellers Opp. at 14 n.12, this case is an appropriate vehicle to decide the legality of FERC's use of "market-based rate tariffs." It involves a direct challenge to the legality of the scheme, FERC had an opportunity to rule on the merits and did so, and the Ninth Circuit addressed it on the merits, as well.

Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 258 (1951) (Frankfurter, J., dissenting) (emphasis added). Thus, even if "reparations" were at issue in this case, the issue of whether the Sellers' "market-based rate tariffs" produced "properly filed" rates is inextricably bound up with the main petition.

B. The Cross-Petition Independently Warrants Review By The Court.

1. Taken together, *Electrical District No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985) (Scalia, J.), *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986) (Scalia, J.), and *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995), hold that a filed tariff must specify the seller's "rate itself," *Electrical Dist. No. 1*, 774 F.2d at 492-93; *Southwestern Bell*, 43 F.3d at 1520-21 (same), or at the very least a rate "formula" that enables the public to determine how the rate will be determined. *Regular Common Carrier Conference* ("*RCC*"), 793 F.2d at 379-80. The Sellers' notion that a market-based rate tariff is a "filed rate" conflicts squarely with these and numerous other cases cited in the cross-petition.

The Sellers are incorrect that "*Electrical District* and its progeny" relate solely to what it means to "fix" a rate under FPA Section 206, and have no bearing on what it means to file a schedule "showing all rates" for "any" sale of wholesale power under FPA Section 205, 16 U.S.C. § 824d(c). Sellers Opp. at 13; *see also* FERC Opp. at 20. The holding in *Electrical District No. 1* – that FERC orders fixing rates must specify the rate itself – applies equally to FERC's acceptance of rates filed under Section 4 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717c (2006), which is substantially identical to FPA Section 205. *See Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1141 (D.C. Cir. 1987); *see also Southwestern Bell*, 43 F.3d at 1521-22 (holding that Section 203(a) of the Communications Act of 1934 ("CA"), 47 U.S.C. § 203(a) (2002), the analog to FPA Section 205(c), contains a "clear congressional mandate"

that filed tariffs show the "actual rate proposed to be charged").[2]

The Sellers further suggest that if formula rates are acceptable, market-based rate tariffs must also pass muster. Sellers Opp. at 14-15 (citing *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 578 (D.C. Cir. 1990)). That does not address the problem, however, because market-based rate tariffs are not formula rates. *See, e.g.,* Petitioners' Appendix ("Pet. App."), No. 06-888, at 40a. And market-based rate tariffs exhibit none of the characteristics which have made formula rates acceptable in some past cases. *E.g., Ocean State Power II*, 69 FERC ¶ 61,146, at p. 61,522 (1994) (a formula rate is premised on the rate design's "fixed, predictable nature").

The Sellers argue that market-based rate tariffs comply with FPA Section 205 because "competitors and customers alike know that prices will be set by the market," Sellers Opp. at 15, and that utilities with market-based rate authority can charge "only the rates set forth in their rate schedules." *Id.* at 10; *see also* FERC Opp. at 22 (arguing that market-based sales are made "in accordance with" a market-based rate umbrella tariff). This is just wordplay. There is nothing in "market-based rate tariffs" to "abide by." Sellers Opp. at 11. They contain no rates, and no standard at all that could be used to determine whether utilities are adhering to the rates supposedly pre-authorized (years in advance and sight unseen) by FERC.

In FERC's scheme, the supposed "filed rate" is *any* rate the market will bear, including a market rife with supplier market power and abuse, unless and until FERC revokes the seller's grant of market-based rate authority, if ever. *But see Arkansas Louisiana Gas Co. v. Hall* ("*Arkla*"), 453 U.S. 571, 577 (1981) (holding that "the Act bars a regulated seller of natural gas from collecting a rate other than the

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[2] The Sellers do not attempt to distinguish *Southwestern Bell*, nor could they. CA Section 203(a), 47 U.S.C. § 203(a), requires "schedules showing all charges," which is virtually identical to FPA Section 205(c)'s mandate for "schedules showing all rates and charges." 16 U.S.C. § 824d(c).

one filed with the Commission"). Further, the public has no way of knowing what the "market" rate will be in any given circumstance, and hence no way to exercise its right of complaint about proposed rates under FPA Section 205(e), 16 U.S.C. § 824d(e). *See, e.g., RCC*, 793 F.2d at 379.[3]

2. In *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), the Federal Communications Commission ("FCC"), like FERC, allowed "non-dominant" long-distance carriers to dispense with rate filings only after it made a prediction, based on record evidence, that they were incapable of exercising market power. The FCC further argued, like FERC, that it would continue to monitor the market, field consumer complaints, initiate investigations on its own motion, and take other affirmative steps to ensure that rates *remained* just and reasonable. The Court, however, rejected the FCC's rationale and held the "permissive detariffing" rule invalid. In doing so, the Court rejected a regulatory model that is identical in all material respects to the one that FERC and the Sellers are trying to defend here.

Similarly, in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), the Interstate Commerce Commission ("ICC") allowed common carriers operating in competitive markets, i.e., common carriers that were presumptively incapable of exercising market power, to charge and collect privately negotiated, unfiled rates that were lower than rates already on file for the same service. This Court held the scheme invalid because, among other reasons, the ICC had no means of judging "in advance the reasonableness of *unfiled* rates," notwithstanding the "new

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[3] The Sellers cite *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866 (D.C. Cir. 1993), to support a claim that "*every court* to have opined" on the issue has upheld FERC's "market-based rate regime." *See* Sellers Opp. at 1 (emphasis in original). In fact, the D.C. Circuit refused to decide in that case whether a scheme similar to FERC's "market-based rate regime" for wholesale power complied with the NGA's rate filing requirements. *Elizabethtown*, 866 F.3d at 871.

competitive atmosphere" in the motor carrier industry. 497 U.S. at 121, 132.

The Sellers and FERC offer various distinctions in order to address the conflict with *Maislin* and *MCI*, but none withstands scrutiny. First, as discussed above, there is essentially no difference between filing a "market-based rate tariff" and filing no tariff at all. "Stripped of its semantic cover," *see Maislin*, 497 U.S. at 131, a "market-based rate tariff" functions as an *ultra vires exemption* from the rate filing requirement.

Second, the suggestion that *Maislin* and *MCI* are somehow inapplicable because the FPA permits customer-specific contracting – an argument that FERC explicitly rejected below[4] – is erroneous. *See* Sellers Opp. at 12; FERC Opp. at 21. The FPA permits utilities to set rates by contract or otherwise, but all contracts, and the rates charged in those contracts, must nonetheless be individually filed under FPA Section 205. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.* ("*Mobile*"), 350 U.S. 332, 339, 342 (1956); *see also Arkla*, 453 U.S. at 582 (the fact that utilities may set rates by contract does not in any way "affect the supremacy of the Act itself").[5] Further, *all* rates, whether set by contract or otherwise, must be just and reasonable. 16 U.S.C. § 824d(a).

The Sellers go so far as to suggest that rate filings – and, indeed, regulatory review of rate filings under FPA section 205 – are wholly unnecessary in the wholesale power industry because the contracting parties are "often sophisticated businesses enjoying presumptively equal bargaining power, who [can] be expected to negotiate a 'just and reasonable' rate as between the two of them." Sellers Opp. at 12 (quoting *Verizon Communications Inc. v.*

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[4] *See* Pet. App. at 70a-71a.

[5] By comparison, Congress expressly permitted the ICC to completely exempt motor contract carriers from the ICA's rate filing requirement. *See Maislin*, 497 U.S. at 133 & n.13 (citations omitted). Congress has never authorized a similar exemption for FERC-jurisdictional public utilities.

FCC, 535 U.S. 467, 479 (2002)). But the argument has little or no bearing on this case, in which the Sellers claim that their "filed rate" is based *not* on customer-specific contracts, but a generally applicable, "umbrella tariff."

Further, the argument fundamentally misstates both the law and the legislative history of the FPA. The FPA departed from the common carrier model because the "vast number of retail transactions of railroads made policing them administratively impossible," whereas, at the time the FPA was enacted, there were "relatively few wholesale transactions," and "these typically require[d] substantial investment in capacity and facilities for the service of a particular [customer]." *See Mobile*, 350 U.S. at 338-39. Further, Congress presumed that public utilities possessed monopoly power, and that they would abuse that power absent effective public regulation. *E.g., Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758-59 (1973).

Finally, the fact that rates must be individually reported after-the-fact for market monitoring purposes, and to facilitate the filing of complaints *after* rates have already gone into operation, does not serve to distinguish *MCI*, *Maislin*, *Southwestern Bell*, *RCC*, or any of the other cases cited in the cross-petition. *See* FERC Opp. at 20-22, 24. In *MCI*, the court rejected the FCC's claim – identical to FERC's claim here – that *post hoc* monitoring and enforcement cures the failure to file all rates in advance. *Compare* 512 U.S. at 230-231 & n.4 *with* 512 U.S. at 243 & n.6 (Stevens, J., dissenting).

The FCC's failure to require the filing of *proposed* rates vitiated CA Section 204, 47 U.S.C. § 204 (2002), which is essentially identical to FPA Section 205(e). *MCI*, 512 U.S. at 230. Focusing solely on a utility's ability to exercise market power at the outset, instead of on the rates to be charged in individual transactions, may or may not be a better scheme for reviewing proposed rates, but it is "not the one that Congress established." *Id.* at 234.

FERC's response to this – that Sections 205(d) and (e) are "fully satisfied" by the filing of a "market-based rate tariff," FERC Opp. at 19 – simply ignores what the Ninth Circuit held about Section 205(e). *See* Pet. App. at 18a

(holding that the "§ 205(e) refund remedy is, practically speaking, eliminated under the scheme as FERC would have us interpret it.").[6] It also fails to come to grips with *MCI*, *Maislin* or any of the other cases cited in the cross-petition, or the text of the statute itself, which requires that each rate charged be individually filed. FERC cannot simply define all rate "changes" out of existence in this manner; such an approach would abrogate the statute's suspension and refund provisions under FPA Section 205(e). *Sun Oil Co. v. FPC*, 281 F.2d 275, 278 (5th Cir. 1960).[7]

Finally, *MCI*'s passing mention that the FCC could "modify" the rate filing requirement by, among other things, deferring the filing of rates in "limited circumstances" does not reconcile FERC's "market-based rate regime" with *MCI*, *Maislin*, and the FPA. *See* FERC Opp. at 23 (citing *MCI*, 512 U.S. at 234). Unlike the FCC, FERC has no parallel authority to "modify" the FPA's filing requirement. And, more to the point, rates are *never* filed under FPA Section 205, they are merely made public after-the-fact.

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[6] FERC and the Sellers purport to defend the Ninth Circuit's decision as an endorsement of the market-based rate regime, but the court only held the scheme does not violate the FPA "*per se*." Pet. App. at 18a. And it went on to hold that post-transaction reporting could not be used solely for "informational" purposes, but had to be treated as an "integral part" of the filed rate itself, with "enforcement mechanisms sufficient to provide substitute remedies for the obtaining of refunds . . . ." *Id.* at 16a. Even after that, however, FERC and the Sellers maintain that quarterly reporting exists solely to facilitate the filing of complaints under FPA Section 206, a contention that the Ninth Circuit rejected on the grounds that such a scheme could not be justified under *Maislin* and *MCI*. *Id.* at 16a-18a.

[7] Contrary to FERC's recitation, the Sellers acknowledge that market-based rate tariffs are frequently (perhaps typically) filed under Section 205(c), and not Section 205(d). Sellers' Opp. at 5. In such cases there is no opportunity at *any* time for the public to exercise their right of complaint under FPA Section 205(e), because that section only applies to rate "changes" filed under Section 205(d), and not to rates filed under Section 205(c). *Middle South Energy, Inc. v. FERC*, 747 F.2d 763, 768-69 (D.C. Cir. 1984).

C. The Question Presented Is Not Whether Competition Is Desirable Or Achievable, But Whether The Use Of "Market-Based Rate Tariffs" Conflicts With *MCI*, *Maislin*, And The FPA.

The Sellers try to paint the cross-petition as a referendum on competitive markets, *see* Sellers Opp. at 20-22, but the question presented here has no bearing on whether competition is desirable or achievable, or whether FERC has discretion to rely on markets as a means of disciplining prices. The issue is whether FERC's use of umbrella, "market-based rate tariffs" conflicts with *MCI*, *Maislin*, and other decisions interpreting FPA Section 205 and other "well-established statutory filed rate requirements." *Maislin*, 497 U.S. at 135. It does.

Further, the Sellers' warning that competitive markets would be "impractical" without the unfettered pricing flexibility afforded by "market-based rate tariffs" is without foundation. Sellers Opp. at 20-22. The Sellers omit the fact that most of the power needed to serve customers is bought and sold under long-term arrangements, and there is no practical reason why long-term contracts that last months and years cannot be separately filed in advance of their taking effect under FPA Section 205.

With respect to short-term, "spot" markets with centralized clearing prices, the Sellers fail to make the case that such markets would be wholly unworkable without "market-based rate tariffs." FERC certainly never made such a determination. But even if they were right, the argument is at bottom a complaint about the FPA's prior notice and filing requirement, and not a reason to deny the cross-petition. "Market-based rate tariffs" may be the best way to sustain highly competitive and liquid spot markets, but only Congress can amend the FPA to permit such a regime, and it has not done so.[8]

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[8] The Sellers argue vainly that the Energy Policy Act of 2005 somehow "ratified" FERC's reliance on "market-based rate tariffs." Sellers Opp. at 16-18. Contrary to their claim, new provisions prohibiting

(Continued on following page)

CONCLUSION

If the Court were to grant the petition in No. 06-888, it should also grant the California Attorney General's cross-petition.

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Respectfully submitted,

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"market manipulation" and promoting price transparency in wholesale power "markets" do not necessarily "presume" the validity of "market-based rate tariffs." Indeed, there were wholesale power "markets" before the FPA was enacted. The salient fact is that Congress did not amend Section 205 to permit "market-based rate tariffs." In sharp contrast, Congress has acted on numerous other occasions to promote competition in regulated industries, or segments thereof, and it has done so specifically by eliminating or relaxing the rate filing requirement. *See, e.g., Worldcom, Inc. v. FCC*, 209 F.3d 760, 762-63 (D.C. Cir. 2000) (domestic long-distance carriers); *Cent. & S. Motor Freight Tariff Ass'n v. U.S.*, 757 F.2d 301 (D.C. Cir. 1985) (motor contract carriers).